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UNITED STATES DEPARTMENT OF THE INTERIOR

WASHINGTON, D.C. 20240

Secretary of the Interior ----- Bruce Babbitt

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This index-digest covers all published and unpublished decisions and opinions, by their headnotes and legal cites, of the Department of the Interior from January 1, 1995 to December 31, 1995, rendered in the Office of Hearings and Appeals (OHA), Arlington, VA, and in the Office of the Solicitor, Interior Building, 18th and C Streets, N.W., Washington, D.C. 20240.

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Compiled by: Cheri Yoesting

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SYMBOLS

AIRFA	----	American Indian Religious Freedom Act of 1978
ALJ	----	Administrative Law Judge
ANCSA	----	Alaska Native Claims Settlement Act
ANILCA	----	Alaska National Interest Lands Conservation Act
APA	----	Administrative Procedure Act
Ass'n	----	Association
Ass't	----	Assistant
AVS	----	Applicant Violator System
BIA	----	Bureau of Indian Affairs
BLM	----	Bureau of Land Management
CFR	----	Code of Federal Regulations
DOI	----	Department of the Interior
EA	----	Environmental Assessment
EAJA	----	Equal Access to Justice Act
EIS	----	Environmental Impact Statement
EPA	----	Environmental Protection Agency
ESA	----	Endangered Species Act
ESC	----	Endangered Species Committee
FAR	----	Federal Acquisition Regulation
FERC	----	Federal Energy Regulatory Commission
FLPMA	----	Federal Land Policy and Management Act of 1976
FONSI	----	Finding of No Significant Impact
(US)FS	----	United States Forest Service
FWS	----	Fish and Wildlife Service
FY	----	Fiscal Year
IBCA	----	Interior Board of Contract Appeals
IBIA	----	Interior Board of Indian Appeals
IBLA	----	Interior Board of Land Appeals
IBMA	----	Interior Board of Mine Operations Appeals
IIM	----	Individual Indian Money
IMLA	----	Indian Mineral Leasing Act of 1938
INC	----	Incident of noncompliance
IRA	----	Indian Reorganization Act
LMU	----	logical mining unit
M	----	Solicitor's Opinion
MLA	----	Mineral Leasing Act
MMS	----	Mineral Management Service
NHPA	----	National Historic Preservation Act
NOV	----	Notice of Violation
NPS	----	National Park Service
O&C	----	Oregon and California Railroad and Reconveyed Coos Bay Grant Lands
OCS	----	Outer Continental Shelf
OHA	----	Office of Hearings and Appeals
OSM(RE)	----	Office of Surface Mining Reclamation and Enforcement
RMP	----	Resource Management Plan
ROD	----	Record of Decision
R.S.	----	Revised Statute
SMCRA	----	Surface Mining Control and Reclamation Act of 1977
SOR	----	Statement of Reasons
U.S.C.	----	United States Code

WSA ----- Wilderness Study Area

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1271(a) (1) -----	132	IBLA 59, 102 I.D. (1995)
	132	IBLA 290 (May 3, 1995)
	132	IBLA 331 (May 9, 1995)
	133	IBLA 372 (Sept. 19, 1995)
	134	IBLA 15 (Oct. 2, 1995)
	134	IBLA 244 (Nov. 30, 1995)
1271(a) (2) -----	132	IBLA 59, 102 I.D. (1995)
	134	IBLA 15 (Oct. 2, 1995)
1272(e) (5) -----	132	IBLA 331 (May 9, 1995)
1275 -----	132	IBLA 290 (May 3, 1995)
	134	IBLA 15 (Oct. 2, 1995)
1275(c) -----	132	IBLA 36 (Feb. 9, 1995)
	132	IBLA 290 (May 3, 1995)
1276(c) -----	132	IBLA 36 (Feb. 9, 1995)
1278(2) -----	134	IBLA 15 (Oct. 2, 1995)
1291(2) -----	132	IBLA 224 (Apr. 13, 1995)
1291(13) -----	133	IBLA 123 (July 26, 1995)
1291(28) (A) -----	134	IBLA 15 (Oct. 2, 1995)
1307(b) -----	133	IBLA 372 (Sept. 19, 1995)
1701-1757 -----	132	IBLA 210 (Apr. 4, 1995)
1711 -----	132	IBLA 354 (May 11, 1995)
1711(a) -----	132	IBLA 354 (May 11, 1995)
1711(c) (1) -----	134	IBLA 267 (Dec. 1, 1995)
1713(b) -----	134	IBLA 267 (Dec. 1, 1995)
1735 -----	134	IBLA 109 (Oct. 12, 1995)
	134	IBLA 172 (Nov. 14, 1995)
1755 -----	134	IBLA 109 (Oct. 12, 1995)
2462 -----	134	IBLA 15 (Oct. 2, 1995)

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sec. 3729-3733 ----- IBCA 3283-F, 102 I.D. 73 (1995)
3729(a) ----- IBCA 3506-9-E (Dec. 8, 1995)

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sec. 483(a) (2) ----- 28 IBIA 247 (Oct. 25, 1995)
4332 ----- 133 IBLA 65 (July 13, 1995)

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sec. 601 ----- IBCA 2844, 102 I.D. (1995)
----- IBCA 3506-95-E (Dec. 8, 1995)
601 et seq. ----- IBCA-2970 a-1, 102 I.D. (1995)
601(g) (1) ----- IBCA-3283-F, 102 I.D. 73 (1995)
604 ----- IBCA-3283-F, 102 I.D. 73 (1995)
605(c) (1) ----- IBCA-2970 a-1, 102 I.D. (1995)
607(g) (1) ----- IBCA-3283-F, 102 I.D. 73 (1995)

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2992c(2) ----- 28 IBIA 247 (Oct. 25, 1995)
4321 et seq. ----- 28 IBIA 124 (Aug. 1, 1995)
4332(C) ----- 131 IBLA 384 (Jan. 9, 1995)
----- 133 IBLA 31 (July 3, 1995)

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sec. 2 ----- 132 IBLA 190 (Mar. 28, 1995)
----- 132 IBLA 317 (May 8, 1995)
----- 132 IBLA 371 (May 24, 1995)
52 ----- 132 IBLA 190 (Mar. 28, 1995)
----- 132 IBLA 317 (May 8, 1995)
----- 132 IBLA 371 (May 24, 1995)
201(a) (3) ----- 133 IBLA 31 (July 3, 1995)
226(m) ----- 132 IBLA 30 (May 3, 1995)
270-1 ----- 132 IBLA 337 (May 9, 1995)
----- 133 IBLA 41 (July 6, 1995)
----- 133 IBLA 281 (Aug. 9, 1995)
----- 133 IBLA 365 (Sept. 14, 1995)
----- 134 IBLA 277 (Dec. 6, 1995)
270-1-270-3 ----- 132 IBLA 337 (May 9, 1995)
----- 133 IBLA 206 (Aug. 1, 1995)
----- 133 IBLA 219 (Aug. 3, 1995)
----- 133 IBLA 281 (Aug. 9, 1995)
----- 134 IBLA 75 (Oct 12, 1995)
----- 134 IBLA 272 (Dec. 5, 1995)
----- 134 IBLA 277 (Dec. 6, 1995)
----- 134 IBLA 294 (Dec. 12, 1995)
270-2 ----- 133 IBLA 41 (July 6, 1995)

	133	IBLA 219	(Aug. 3, 1995)
270-3 -----	132	IBLA 337	(May 9, 1995)
	133	IBLA 281	(Aug. 9, 1995)
	133	IBLA 365	(Sept. 14, 1995)
	134	IBLA 277	(Dec. 6, 1995)
	134	IBLA 294	(Dec. 12, 1995)
315a -----	131	IBLA 390	(Jan. 18, 1995)
315b -----	131	IBLA 390	(Jan. 18, 1995)
	133	IBLA 225	(Aug. 3, 1995)
315h -----	131	IBLA 390	(Jan. 18, 1995)
321 -----	134	IBLA 186	(Nov. 20, 1995)
328 -----	134	IBLA 186	(Nov. 20, 1995)
329 -----	134	IBLA 186	(Nov. 20, 1995)
321-339 -----	134	IBLA 186	(Nov. 20, 1995)
333 -----	134	IBLA 186	(Nov. 20, 1995)
334 -----	134	IBLA 186	(Nov. 20, 1995)
661 -----	133	IBLA 346	(Sept. 13, 1995)
682a -----	132	IBLA 154	(Mar. 17, 1995)
687a -----	134	IBLA 37	(Oct. 4, 1995)
	134	IBLA 46	(Oct. 4, 1995)
	134	IBLA 145	(Nov. 7, 1995)
	134	IBLA 239	(Nov. 29, 1995)
687a-1 -----	134	IBLA 145	(Nov. 7, 1995)
	134	IBLA 239	(Nov. 29, 1995)
751-753 -----	132	IBLA 190	(Mar. 28, 1995)
	132	IBLA 317	(May 8, 1995)
	132	IBLA 371	(May 24, 1995)
772 -----	132	IBLA 244	(Apr. 17, 1995)
869 -----	132	IBLA 152	(Mar. 17, 1995)
869-1 -----	132	IBLA 398	(June 15, 1995)
897 -----	132	IBLA 49	(Feb. 14, 1995)
898 -----	132	IBLA 49	(Feb. 14, 1995)
932 -----	132	IBLA 91	(Feb. 21, 1995)
959 -----	134	IBLA 206	(Nov. 29, 1995)
961 -----	134	IBLA 206	(Nov. 29, 1995)
982 -----	132	IBLA 337	(May 9, 1995)
1161 -----	134	IBLA 145	(Nov. 7, 1995)
1164 -----	134	IBLA 145	(Nov. 7, 1995)
1254 -----	134	IBLA 244	(Nov. 30, 1995)
1601(b) -----	134	IBLA 75	(Oct. 12, 1995)
1601-1629(a) -----	132	IBLA 186	(Mar. 28, 1995)
1601-1629e -----	28	IBIA 247	(Oct. 25, 1995)
1601(b) -----	134	IBLA 75,	(Oct. 12, 1995)
1601 <u>et seq.</u> -----	132	IBLA 186	(Mar. 28, 1995)
1610 -----	133	IBLA 1	(June 28, 1995)
1613(h) (1) -----	132	IBLA 197	(Mar. 29, 1995)
1616(b) -----	132	IBLA 197	(Mar. 29, 1995)
	134	IBLA 277	(Dec. 6, 1995)
1616(b) (1) -----	132	IBLA 197	(Mar. 29, 1995)
1616(b) (3) -----	132	IBLA 197	(Mar. 29, 1995)
1617 -----	133	IBLA 206	(Aug. 1, 1995)
	134	IBLA 75	(Oct. 12, 1995)

1617(a) -----	132 IBLA 337 (May 9, 1995)
	133 IBLA 41 (July 6, 1995)
	133 IBLA 219 (Aug. 3, 1995)
	133 IBLA 281 (Aug. 9, 1995)
	133 IBLA 365 (Sept. 14, 1995)
	134 IBLA 272 (Dec. 5, 1995)
	134 IBLA 277 (Dec. 6, 1995)
	134 IBLA 294 (Dec. 12, 1995)
1634 -----	132 IBLA 337 (May 9, 1995)
	133 IBLA 41 (July 6, 1995)
	133 IBLA 365 (Sept. 14, 1995)
	134 IBLA 75 (Oct. 12, 1995)
	134 IBLA 92 (Oct. 12, 1995)
	134 IBLA 277 (Dec. 6, 1995)
1634(a) -----	132 IBLA 337 (May 9, 1995)
	133 IBLA 41 (July 6, 1995)
	133 IBLA 219 (Aug. 3, 1995)
	134 IBLA 239 (Nov. 29, 1995)
1634(a) (1) -----	132 IBLA 337 (May 9, 1995)
	133 IBLA 219 (Aug. 3, 1995)
	133 IBLA 281 (Aug. 9, 1995)
	133 IBLA 365 (Sept. 14, 1995)
	134 IBLA 75 (Oct. 12, 1995)
	134 IBLA 277 (Dec. 6, 1995)
1634(a) (3) -----	133 IBLA 281 (Aug. 9, 1995)
1634(a) (5) -----	132 IBLA 337 (May 9, 1995)
	133 IBLA 219 (Aug. 3, 1995)
	133 IBLA 365 (Sept. 14, 1995)
	134 IBLA 75 (Oct. 12, 1995)
	134 IBLA 277 (Dec. 6, 1995)
1634(a) (5) (B) -----	134 IBLA 75 (Oct. 12, 1995)
	134 IBLA 277 (Dec. 6, 1995)
1634(a) (5) (C) -----	132 IBLA 337 (May 9, 1995)
	133 IBLA 365 (Sept. 14, 1995)
	134 IBLA 75 (Oct. 12, 1995)
	134 IBLA 239 (Nov. 29, 1995)
1634(b) -----	133 IBLA 365 (Sept. 14, 1995)
1634(c) -----	132 IBLA 337 (May 9, 1995)
	133 IBLA 41 (July 6, 1995)
	133 IBLA 365 (Sept. 14, 1995)
	134 IBLA 75 (Oct. 12, 1995)
1634(e) -----	133 IBLA 365 (Sept. 14, 1995)
	134 IBLA 239 (Nov. 29, 1995)
1701 -----	134 IBLA 186 (Nov. 20, 1995)
1701-1782 -----	132 IBLA 91 (Feb. 21, 1995)
	133 IBLA 65 (July 13, 1995)
1701-1784 -----	133 IBLA 361 (Sept. 14, 1995)
1701(a) -----	132 IBLA 110 (Feb. 28, 1995)
1702(a) -----	133 IBLA 65 (July 13, 1995)
1702(d) -----	132 IBLA 110 (Feb. 28, 1995)
1702(f) -----	133 IBLA 65 (July 13, 1995)
1712 -----	132 IBLA 255 (Apr. 19, 1995)

	133 IBLA 31 (July 3, 1995)
	134 IBLA 191 (Nov. 21, 1995)
1712(e) (2) -----	133 IBLA 65 (July 13, 1995)
1712(f) -----	132 IBLA 110 (Feb. 28, 1995)
1716 -----	133 IBLA 263 (Aug. 3, 1995)
1716(a) -----	133 IBLA 263 (Aug. 3, 1995)
1732(a) -----	133 IBLA 31 (July 3, 1995)
	134 IBLA 191 (Nov. 21, 1995)
1732(b) -----	131 IBLA 390 (Jan. 18, 1995)
	132 IBLA 261 (Apr. 21, 1995)
	132 IBLA 359 (May 17, 1995)
	133 IBLA 104 (July 20, 1995)
1732(b) -----	134 IBLA 119 (Nov. 1, 1995)
1733(g) -----	132 IBLA 359 (May 17, 1995)
1734(c) -----	132 IBLA 8 (Jan. 19, 1995)
1739(e) -----	132 IBLA 110 (Feb. 28, 1995)
1744 -----	132 IBLA 103 (Feb. 27, 1995)
	132 IBLA 138 (Mar. 15, 1995)
	132 IBLA 152 (Mar. 17, 1995)
	132 IBLA 220 (Apr. 11, 1995)
	133 IBLA 1 (June 28, 1995)
	133 IBLA 329 (Aug. 31, 1995)
1744(a) -----	132 IBLA 29 (Jan. 25, 1995)
	132 IBLA 103 (Feb. 27, 1995)
	132 IBLA 138 (Mar. 15, 1995)
	132 IBLA 152 (Mar. 17, 1995)
	132 IBLA 279 (Apr. 27, 1995)
	133 IBLA 214 (Aug. 2, 1995)
	133 IBLA 294 (Aug. 9, 1995)
	133 IBLA 381 (Sept. 21, 1995)
	134 IBLA 196 (Nov. 22, 1995)
1744(b) -----	132 IBLA 152 (Mar. 17, 1995)
	132 IBLA 279 (Apr. 27, 1995)
	132 IBLA 393 (June 14, 1995)
1744(c) -----	132 IBLA 29 (Jan. 25, 1995)
	132 IBLA 103 (Feb. 27, 1995)
	132 IBLA 138 (Mar. 15, 1995)
	132 IBLA 152 (Mar. 17, 1995)
	133 IBLA 214 (Aug. 2, 1995)
	133 IBLA 294 (Aug. 9, 1995)
	133 IBLA 381 (Sept. 21, 1995)
	134 IBLA 196 (Nov. 22, 1995)
1752 -----	131 IBLA 390 (Jan. 18, 1995)
1761 -----	132 IBLA 17 (Jan. 23, 1995)
	132 IBLA 384 (June 6, 1995)
	133 IBLA 346 (Sept. 13, 1995)
	134 IBLA 206 (Nov. 29, 1995)
1761-1771 -----	131 IBLA 379 (Jan. 9, 1995)
	131 IBLA 384 (Jan. 9, 1995)
	132 IBLA 270 (Apr. 24, 1995)
	133 IBLA 65 (July 13, 1995)
	133 IBLA 268 (Aug. 7, 1995)

	134 IBLA 53 (Oct. 4, 1995)
	134 IBLA 206 (Nov. 29, 1995)
1761(a) -----	131 IBLA 384 (Jan. 9, 1995)
	132 IBLA 270 (Apr. 24, 1995)
	133 IBLA 321 (Aug. 22, 1995)
1761(a) (1) -----	133 IBLA 317 (Aug. 22, 1995)
1761(a) (5) -----	132 IBLA 17 (Jan. 23, 1995)
1761(a) (6) -----	132 IBLA 384 (June 6, 1995)
	133 IBLA 321 (Aug. 22, 1995)
	134 IBLA 19 (Oct. 2, 1995)
1761(a) (7) -----	133 IBLA 321 (Aug. 22, 1995)
1761(b) (1) -----	131 IBLA 384 (Jan. 9, 1995)
	134 IBLA 206 (Nov. 29, 1995)
1763 -----	131 IBLA 384 (Jan. 9, 1995)
	133 IBLA 65 (July 13, 1995)
1764(b) -----	134 IBLA 206 (Nov. 29, 1995)
1764(g) -----	131 IBLA 379 (Jan. 9, 1995)
	132 IBLA 17 (Jan. 23, 1995)
	132 IBLA 384 (June 6, 1995)
	133 IBLA 268 (Aug. 7, 1995)
	134 IBLA 53 (Oct. 4, 1995)
	134 IBLA 206 (Nov. 29, 1995)
1765 -----	134 IBLA 206 (Nov. 29, 1995)
1766 -----	134 IBLA 206 (Nov. 29, 1995)
1782 -----	132 IBLA 255 (Apr. 19, 1995)
1782(a) -----	133 IBLA 104 (July 20, 1995)
1782(c) -----	131 IBLA 390 (Jan. 18, 1995)
	132 IBLA 255 (Apr. 19, 1995)
	132 IBLA 388 (June 13, 1995)
	133 IBLA 104 (July 20, 1995)
4332(2) (C) (iii) -----	132 IBLA 270 (Apr. 24, 1995)
4332(C) (2) -----	132 IBLA 270 (Apr. 24, 1995)

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sec. 1507 -----	133 IBLA 365 (Sept. 14, 1995)
1510 -----	133 IBLA 365 (Sept. 14, 1995)

TITLE 48

sec. 341 -----	133 IBLA 361 (Sept. 14, 1995)
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TITLE 49

sec. 65(b) -----	132 IBLA 49 (Feb. 14, 1995)
10501(a) -----	134 IBLA 206 (Nov. 29, 1995)
10701(a) -----	134 IBLA 206 (Nov. 29, 1995)
10762(a) (1) -----	134 IBLA 206 (Nov. 29, 1995)
10721(a) (2) -----	132 IBLA 49 (Feb. 14, 1995)
11701 -----	134 IBLA 206 (Nov. 29, 1995)

ACQUIRED LANDS

Land acquired by the United States subject to a reservation of minerals was unavailable for location of a mining claim.

Robert D. Davis, 132 IBLA 253 (Apr. 17, 1995)

ACT OF JULY 26, 1866

Reconsideration of a Board decision dismissing an appeal for lack of standing to appeal an administrative determination by BLM that a road is a R.S. 2477 right-of-way will be granted and the decision vacated where it is established that the determination was made in connection with a proposed road improvement project which would allegedly adversely affect public lands and resources.

Southern Utah Wilderness Alliance (On Reconsideration), 132 IBLA 91 (Feb. 21, 1995)

ACT OF NOVEMBER 9, 1921

Those portions of mining claims located on lands subject to a material site right-of-way grant issued pursuant to sec. 317 of the Federal Aid Highway Act, 23 U.S.C. § 317 (1988), and a material site right-of-way granted under the Act of Nov. 9, 1921, 23 U.S.C. § 18 (1946), are properly declared null and void ab initio.

Paul Tobeler, 133 IBLA 361 (Sept. 14, 1995)

ACT OF AUGUST 27, 1958

Those portions of mining claims located on lands subject to a material site right-of-way grant issued pursuant to sec. 317 of the Federal Aid Highway Act, 23 U.S.C. § 317 (1988), and a material site right-of-way

ACT OF AUGUST 27, 1958--Continued

granted under the Act of Nov. 9, 1921, 23 U.S.C. § 18 (1946), are properly declared null and void ab initio.

Paul Tobeler, 133 IBLA 361 (Sept. 14, 1995)

ADMINISTRATIVE APPEALS

GENERALLY

The Board of Indian Appeals will not consider arguments that could and should have been raised in prior litigation concerning the identical subject matter.

The Board of Indian Appeals is not required to consider evidence and arguments raised for the first time in a reply brief.

Winlock Veneer Co. v. Juneau Area Director, Bureau of Indian Affairs, 28 IBIA 149 (Sept. 5, 1995)

ADMINISTRATIVE AUTHORITY

(See also Delegation of Authority, Federal Employees & Officers, Secretary of the Interior)

GENERALLY

Where the Solicitor determines that the Department is without authority to convey certain lands to Alaska villages, and that determination is adopted by the Ass't Secretary for Land and Minerals Management and declared to be the final action of the Department, under Blue Star, Inc., 41 IBLA 333 (1979), the Board of Land Appeals is without jurisdiction to review the matter.

Cook Inlet Region, Inc., 132 IBLA 186 (Mar. 28, 1995)

ADMINISTRATIVE AUTHORITY--Continued

GENERALLY--Continued

Where the Board reverses a decision by OSM under 30 CFR 842.15 declining to order a Federal inspection, the Board's authority is limited to ordering such inspection. Upon completion of the inspection, it is within OSM's authority to determine whether enforcement action is warranted.

Dixie Fuels Co., 132 IBLA 331 (May 9, 1995)

When the FERC issues a certificate of convenience and necessity for a natural gas pipeline that crossing public land and a petition for judicial review of the certificate is filed with the appropriate U.S. Court of Appeals, the exclusive judicial review provision of 15 U.S.C. § 717r (1988), does not deprive the Secretary of the Interior of his authority to review a decision of a subordinate approving a right-of-way for the pipeline. A motion to dismiss an appeal to the Board of Land Appeals (which exercises the Secretary's delegated administrative review authority) claiming the appeal to be a collateral attack on a FERC certificate authorizing the pipeline is properly denied.

Wyoming Independent Producers Ass'n, Independent Petroleum Ass'n of Mountain States, Wyoming Outdoor Council, National Trust for Historic Preservation, 133 IBLA 65 (July 13, 1995)

A MMS demand for additional royalty on production from Federal onshore oil and gas leases is an administrative action not covered by 28 U.S.C. § 2415(a)(1988), which establishes a 6-year time limitation for the commencement of judicial actions for damages by the United States.

Texaco Inc., 134 IBLA 109 (Oct. 12, 1995)

ADMINISTRATIVE AUTHORITY--Continued

GENERALLY--Continued

A decision reinstating a Native allotment application covering lands previously conveyed out of Federal ownership is not an adversarial adjudication of entitlement of the applicant to an allotment which is dispositive of the rights of the applicant or adverse parties since the Department lacks jurisdiction to make such a ruling in the absence of legal title and an appeal of such a decision by an adverse party is properly dismissed as premature.

State of Alaska, 134 IBLA 272 (Dec. 5, 1995)

ESTOPPEL

A claim of estoppel against the United States will be rejected where there is no showing of affirmative misconduct in the nature of an erroneous statement of fact in an official written decision or where the effect of allowing estoppel would be to grant a right not authorized by law.

United States v. Hiram B. Webb, 132 IBLA 152 (Mar. 17, 1995)

LACHES

BLM properly requires the holder of a communication site right-of-way to pay rental charges, in addition to those originally estimated at the time of issuance of the right-of-way grant, based upon an appraisal of the fair market rental value of the right-of-way grant. A delay of over 2 years between issuance of the right-of-way grant and notification to the holder of the appraised rental value does not relieve the right-of-way

ADMINISTRATIVE AUTHORITY--Continued

LACHES--Continued

holder of the obligation to pay the appraised rental charges.

Michael D. Dahmer, 132 IBLA 17 (Jan. 23, 1995)

ADMINISTRATIVE PROCEDURE

(See also Appeals, Confidential Information, Contests & Protests, Hearings, Judicial Review, Public Records, Regulations, Rules of Practice)

GENERALLY

Although directed by Curt Farmer Pack Llamas, 132 IBLA 42 (1995), to renew a commercial recreation permit, BLM refused to do so; no justification for this failure to comply with the cited decision having been provided, BLM is directed forthwith to issue a permit to Farmer for a reasonable term consistent with the use sought to be permitted.

Curt Farmer Pack Llamas, 133 IBLA 278 (Aug. 9, 1995)

Where a decision clarifying a controlling issue of law issues during the pendency of an appeal, a party may properly amend its SOR to cite that case in support of its appeal.

Where the State of Alaska was not served with a copy of an ALJ's decision overturning a BLM finding that certain lands are mineral-in-character, it is not barred from challenging that finding in its appeal from a subsequent BLM decision granting a Native allotment for those lands. In these circumstances, it is appropriate

ADMINISTRATIVE PROCEDURE--Continued

GENERALLY--Continued

to refer the matter to the Hearings Division to allow the State the opportunity to do so.

State of Alaska, Dept. of Transportation & Public Facilities (In re Irene Johnson & Jack Craig), 133 IBLA 281 (Aug. 9, 1995)

Where the Government files a contest complaint against a Native allotment application, the Government bears the burden of presenting a prima facie case establishing that evidence of record does not affirmatively show compliance with all of the statutory and regulatory requirements necessary to obtain title to a Native allotment under the Native Allotment Act of 1906.

The voluntary decision of a contestee not to proceed but rather to challenge a ruling by an ALJ that a prima facie case has been presented at a hearing constitutes a waiver of the contestee's right to present evidence on his or her own behalf. Should the appeal of the ruling be unsuccessful, the contestee will not ordinarily be afforded an additional hearing.

Where, at the close of the Government's case-in-chief, a contestee moves for dismissal of the complaint on the ground that a prima facie showing has not been made, it is error for an ALJ to take the motion under advisement and direct the contestee to proceed with its presentation.

United States v. Angeline Galbraith, 134 IBLA 75 (Oct. 12, 1995) 102 I.D. 116

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE LAW JUDGES

While parties are free to waive post-hearing briefs, an ALJ must make detailed findings and conclusions on the record. When parties wish to shorten the time for filing an appeal and the ALJ is willing to issue an oral decision, he must nevertheless fully and clearly present his findings of fact and conclusions of law for the record.

An ALJ is not limited to deciding issues of fact under 43 CFR 4.1286. An ALJ is expected to receive evidence on and consider all relevant matters and to address the legal and factual issues necessary to resolve the dispute between the parties. If the Board wishes to limit the scope of a hearing, it may so state in the order of referral.

James Spur, Inc., et al. v. Office of Surface Mining & Enforcement, 133 IBLA 123 (July 26, 1995) 102 I.D. 43

ADMINISTRATIVE RECORD

Where the record is inadequate to determine whether, in fact, appellant met the diligent development requirement under subsequent regulations incorporated in the lease, the matter will be remanded to MMS to compute royalty due.

Cyprus Western Coal Co. (On Judicial Remand), 133 IBLA 52 (July 11, 1995)

It is incumbent upon BLM to ensure that its decision is supported by a rational basis and that such basis is stated in the written decision, as well as being demonstrated in the administrative record accompanying the decision. A decision requiring payment of fees for road use under an O&C logging road right-of-way will be set aside where neither the decision nor the

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE RECORD--Continued

case record provide any support for requiring such payment.

Larry Brown & Associates, 133 IBLA 202 (July 27, 1995)

An administrative decision is properly set aside and remanded if it is not supported by a case record providing the Board the information necessary for an objective, independent review of the basis for decision.

Great Western Onshore Inc., 133 IBLA 386 (Sept. 22, 1995)

Where the Board of Land Appeals, based on the record before it, orders the issuance of a contest complaint, the record which was before the Board should be offered and admitted into evidence at any subsequent hearing unless otherwise expressly provided by the Board.

United States v. Angeline Galbraith, 134 IBLA 75
(Oct. 12, 1995) 102 I.D. 116

ADMINISTRATIVE REVIEW

Where the Solicitor determines that the Department is without authority to convey certain lands to Alaska villages, and that determination is adopted by the Ass't Secretary for Land and Minerals Management and declared to be the final action of the Department, under Blue Star, Inc., 41 IBLA 333 (1979), the Board of Land Appeals is without jurisdiction to review the matter.

Cook Inlet Region, Inc., 132 IBLA 186 (Mar. 28, 1995)

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE REVIEW--Continued

The Board has no jurisdiction over appeals from the approval or amendment of an RMP, but only over actions implementing such a plan. 43 CFR 1610.5-2; 43 CFR 1610.5-3. A "Planning Update" distributed by a BLM resource area manager which was relative to the resource management planning process and was preliminary to issuance of a final RMP is not subject to administrative review by the Board of Land Appeals because actions described therein are not actions implementing an RMP or some portion thereof. 43 CFR 1610.5-3(b).

Southern Utah Wilderness Alliance, American Rivers,
132 IBLA 255 (Apr. 19, 1995)

It is incumbent upon BLM to ensure that its decision is supported by a rational basis and that such basis is stated in the written decision, as well as being demonstrated in the administrative record accompanying the decision. A decision requiring payment of fees for road use under an O&C logging road right-of-way will be set aside where neither the decision nor the case record provide any support for requiring such payment.

Larry Brown & Associates, 133 IBLA 202 (July 27, 1995)

Although the Board of Land Appeals has no jurisdiction to review appeals of decisions to approve or amend a RMP, approval of an activity plan designed to implement a RMP is appealable to the Board.

Petroleum Ass'n of Wyoming, et al., 133 IBLA 337
(Sept. 7, 1995)

ADMINISTRATIVE PROCEDURE--Continued

ADMINISTRATIVE REVIEW--Continued

An administrative decision is properly set aside and remanded if it is not supported by a case record providing the Board the information necessary for an objective, independent review of the basis for decision.

Great Western Onshore Inc., 133 IBLA 386 (Sept. 22, 1995)

BURDEN OF PROOF

A party appealing under the regulations at 43 CFR 1280-1286 an OSM decision to grant a Phase I bond release with regard to a reclaimed area bears the burden of showing that OSM erred.

William H. Pullen, Jr., et al., 132 IBLA 224 (Apr. 13, 1995)

DECISIONS

While parties are free to waive post-hearing briefs, an ALJ must make detailed findings and conclusions on the record. When parties wish to shorten the time for filing an appeal and the ALJ is willing to issue an oral decision, he must nevertheless fully and clearly present his findings of fact and conclusions of law for the record.

An ALJ is not limited to deciding issues of fact under 43 CFR 4.1286. An ALJ is expected to receive evidence on and consider all relevant matters and to address the legal and factual issues necessary to resolve the dispute between the parties. If the Board

ADMINISTRATIVE PROCEDURE--Continued

DECISIONS--Continued

wishes to limit the scope of a hearing, it may so state in the order of referral.

James Spur, Inc., et al. v. Office of Surface Mining & Enforcement, 133 IBLA 123 (July 26, 1995) 102 I.D. 43

It is incumbent upon BLM to ensure that its decision is supported by a rational basis and that such basis is stated in the written decision, as well as being demonstrated in the administrative record accompanying the decision. A decision requiring payment of fees for road use under an O&C logging road right-of-way will be set aside where neither the decision nor the case record provide any support for requiring such payment.

Larry Brown & Associates, 133 IBLA 202 (July 27, 1995)

JUDICIAL REVIEW

When the FERC issues a certificate of convenience and necessity for a natural gas pipeline that crossing public land and a petition for judicial review of the certificate is filed with the appropriate U.S. Court of Appeals, the exclusive judicial review provision of 15 U.S.C. § 717r (1988), does not deprive the Secretary of the Interior of his authority to review a decision of a subordinate approving a right-of-way for the pipeline. A motion to dismiss an appeal to the Board of Land Appeals (which exercises the Secretary's delegated administrative review authority) claiming the appeal to be a collateral attack on a FERC certificate authorizing the pipeline is properly denied.

Wyoming Independent Producers Ass'n, Independent Petroleum Ass'n of Mountain States, Wyoming Outdoor Council, National Trust for Historic Preservation, 133 IBLA 65 (July 13, 1995)

ADMINISTRATIVE PROCEDURE--Continued

RULEMAKING

In a case in which the evidence of record establishes that a producing reservoir penetrated by a well prior to July 1976 was reasonably believed by the operator to be commercially producible under sec. 102(d)(2)(B)(iii) of the Natural Gas Policy Act on the basis of side wall cores and core analysis showing the reservoir to be productive of gas, a finding that the reservoir was not discovered before July 1976 based on an induction-electric well log which did not show a minimum of 15 feet of producible sand in one section will be reversed in the absence of a regulation promulgating this requirement under the language of sec. 102(d)(2)(b)(iii).

Mobil Oil Corp. v. Minerals Management Service, 133 IBLA 300 (Aug. 15, 1995)

STANDING

A BIA ruling concerning an appellant's standing is a legal conclusion subject to full review by the Board of Indian Appeals, even though it is part of an otherwise discretionary decision made by the Bureau.

Muscogee (Creek) Nation v. Muskogee Area Director, Bureau of Indian Affairs, 28 IBIA 24 (May 18, 1995)

A lessee of Indian trust or restricted property lacks standing to raise an alleged violation of 25 CFR 162.8 as it relates to written concurrence of the landowner in a rental rate adjustment.

Richard Gossett, Audrey Pentz, Judith Booth, Stewart Hutt, Richard Wells, & Kenneth McDonald v. Portland Area Director, Bureau of Indian Affairs, 28 IBIA 72 (June 19, 1995)

ADMINISTRATIVE PROCEDURE--Continued

STANDING--Continued

A party will not be accorded standing to appeal from a BLM decision where it does not demonstrate that it has a legally cognizable interest which has been adversely affected by that decision. Where a party appeals a BLM ROD approving a habitat management plan that, by itself, has no adverse consequences, actual or threatened, because it does not finally implement the challenged approved alternatives but rather identifies the additional actions necessary to implement the plan, including the opportunities for affected parties to participate in and appeal from the final implementation actions, the party lacks standing to appeal because it has not yet been adversely affected by BLM's decision, and its appeal is properly dismissed.

Petroleum Ass'n of Wyoming, et al., 133 IBLA 337
(Sept. 7, 1995)

Where an Indian oil and gas lease is included in a communitization agreement, and the only producing well in the communitized area is located on the Indian lease, a person with an interest in the communitization agreement has standing to challenge a BIA determination that the Indian lease has expired.

McCulliss Resources Co., Inc. v. Acting Phoenix Area Director, Bureau of Indian Affairs, 28 IBIA 268
(Oct. 30, 1995)

ALASKA

HEADQUARTERS SITES

A headquarters site application which states that the site is used as a trapper headquarters is properly rejected when, despite the fact that the applicant constructed a cabin on the site, he fails to submit any evidence that he engaged in a productive trapping industry there during the statutory life of the claim.

John C. Phariss, 134 IBLA 46 (Oct. 4, 1995)

BLM properly denies a request to reinstate a headquarters site claim canceled for failure to submit an application to purchase the claim and required proof within 5 years of filing a notice of location of the claim, as required by 43 U.S.C. § 687a-1 (1982) and 43 CFR 2563.1-1(c), and declines to equitably adjudicate the claim under 43 U.S.C. §§ 1161, 1164 (1988) and 43 CFR 1871.1-1(a), where the evidence establishes only that, during the 5-year statutory life of the claim, the claimant erected a cabin on the land which he rented to one party for 6 months and to others for unspecified periods under unspecified terms. In these circumstances, the claimant did not show substantial compliance with the requirements of the headquarters site law by establishing that he used the land in connection with a productive industry, as required by sec. 10 of the Act of May 14, 1898, as amended, 43 U.S.C. § 687a (1982).

Thomas B. Craig, 134 IBLA 145 (Nov. 7, 1995)

NATIVE ALLOTMENTS

A Native allotment application that is amended, pursuant to sec. 905(c) of ANILCA, to encompass

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

different land (in part) is not legislatively approved as to the land described in the amended application and is properly adjudicated under Act of May 17, 1906, as amended, when a protest meeting the requirements of sec. 905(a)(5) of ANILCA is filed within 60 days following the mailing of notice of the amended description to the State and interested parties even though the protest is addressed solely to the additional land.

Under sec. 905(a)(5)(C) of ANILCA, 43 U.S.C. § 1634(a)(5)(C) (1988), any individual objecting to the applicant's entitlement to a Native allotment must file a protest within the period established by ANILCA and must allege that the land described in the application is the situs of improvements claimed by the person filing the protest. The subsequent withdrawal of such a protest after the close of the protest period does not obviate the requirement to adjudicate the application.

Edward N. O'Leary, 132 IBLA 337 (May 9, 1995)

The right of an Alaska Native allotment applicant, provided by sec. 905(c) of ANILCA, 43 U.S.C. § 1634(c) (1988), to amend the description on his application where it designates land other than that which the applicant intended to claim at the time of application terminates upon the establishment, by the Secretary, after proper notice, of a date certain on which all requests for amendment must be received.

Silas Solomon, 133 IBLA 41 (July 6, 1995)

A Native allotment application that was rejected in 1961 for 156 of the 160 acres claimed, without giving the applicant a hearing on a disputed question of fact, was properly reinstated in 1979, and adjudicated, as

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

required by sec. 905(a) of ANILCA, 43 U.S.C. § 1634(a) (1988).

Actual occupancy and continuous use of a tract of land by an Alaskan Native prior to its inclusion within a national forest confers a preference right to an allotment under the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 - 270-3 (1970). The applicant's preference right is not adversely affected because use and occupancy occurred prior to passage of the 1906 Act, or because the application was filed subsequently to the proclamation creating the forest withdrawal.

Forest Service, U.S. Dept. of Agriculture (Heirs of Frank Kitka), 133 IBLA 219 (Aug. 3, 1995)

A Native allotment application will be considered to have been pending before the Department on or before Dec. 18, 1971, as required by sec. 905(a)(1) of ANILCA where the record contains a copy of a handwritten application signed by the applicant which was date-stamped by BIA prior to that date and which is virtually identical (except for a missing land description) to a typewritten application later filed with BLM.

A materials site right-of-way will be considered a valid existing right within the meaning of sec. 905(a)(1) of ANILCA, and thus not subject to legislative approval, where the land was mineral-in-character during the period of use and occupancy by the Native prior to the creation of the right-of-way, and thus not available for allotment.

State of Alaska, Dept. of Transportation & Public Facilities (In re Irene Johnson & Jack Craig), 133 IBLA 281 (Aug. 9, 1995)

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

Sec. 905(a)(5) of ANILCA, 43 U.S.C. § 1634(a)(5) (1994), established a specific time limitation for raising objections to the approval of designated Native allotment applications; therefore an individual's protest to BLM's finding that a Native allotment was statutorily approved must be dismissed where it is based on ownership of improvements situated in part on the allotment with no entry of record and was filed more than 180 days following enactment of ANILCA.

Jack C. Vantrease, 133 IBLA 365 (Sept. 14, 1995)

In order for legislative approval to apply to an allotment application which has been amended pursuant to sec. 905(c) of ANILCA, 43 U.S.C. § 1634(c) (1988), the allotment applicant must first establish that the new description embraces the land for which he or she originally intended to make application.

Under sec. 905(a)(5)(B) of ANILCA, 43 U.S.C. § 1634(a)(5)(B) (1988), the timely filing of a valid protest by the State of Alaska prevents the application from being legislatively approved and requires adjudication of the application under the Native Allotment Act of 1906. The subsequent withdrawal of such a protest does not obviate the statutory requirement to adjudicate the application.

Under sec. 905(a)(5)(C) of ANILCA, 43 U.S.C. § 1634(a)(5)(C) (1988), the timely filing of a valid protest by an individual claiming ownership of improvements on land sought for allotment prevents the application from being legislatively approved and requires adjudication of the application under the Native Allotment Act of 1906. The fact that the improvements may have been constructed on the land without color of right has no bearing on the requirement that the allotment applicant must show qualifying use and occupancy of the land sought.

Where the Government files a contest complaint against a Native allotment application, the Government

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

bears the burden of presenting a prima facie case establishing that evidence of record does not affirmatively show compliance with all of the statutory and regulatory requirements necessary to obtain title to a Native allotment under the Native Allotment Act of 1906.

The voluntary decision of a contestee not to proceed but rather to challenge a ruling by an ALJ that a prima facie case has been presented at a hearing constitutes a waiver of the contestee's right to present evidence on his or her own behalf. Should the appeal of the ruling be unsuccessful, the contestee will not ordinarily be afforded an additional hearing.

Where, at the close of the Government's case-in-chief, a contestee moves for dismissal of the complaint on the ground that a prima facie showing has not been made, it is error for an ALJ to take the motion under advisement and direct the contestee to proceed with its presentation.

United States v. Angeline Galbraith, 134 IBLA 75
(Oct. 12, 1995) 102 I.D. 116

Where protests of a Native allotment application were presented prior to passage of sec. 905(a)(5)(C), 43 U.S.C. § 1634(a)(5)(C) (1988), or filed after the 180-day period specified in the Act, both are properly dismissed and will not bar legislative approval of the allotment application.

Notice of location of homesite was not a "record entry or application" within the scope of sec. 905(e) of ANILCA, 43 U.S.C. § 1634(e) (1988), where notice of location never ripened into an application and the entry was declared void with administrative finality prior to the enactment of ANILCA.

Theodore J. Almasy, 134 IBLA 239 (Nov. 29, 1995)

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

A decision reinstating a Native allotment application covering lands previously conveyed out of Federal ownership is not an adversarial adjudication of entitlement of the applicant to an allotment which is dispositive of the rights of the applicant or adverse parties since the Department lacks jurisdiction to make such a ruling in the absence of legal title and an appeal of such a decision by an adverse party is properly dismissed as premature.

State of Alaska, 134 IBLA 272 (Dec. 5, 1995)

The filing of a legally sufficient State protest pursuant to sec. 905(a)(5)(B) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(5)(B) (1988), precludes a Native allotment application from being legislatively approved under the terms of the statute, even where the protest was subsequently withdrawn.

In a contest of a Native allotment claim, BLM establishes a prima facie case that the claimant failed to satisfy the use and occupancy requirements of the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), when it presents evidence that, on the basis of an on-the-ground examination of the parcels with the claimant present, it has been unable to confirm any qualifying use and occupancy due to the lack of any physical evidence of such activity.

In a contest of a Native allotment claim, a claimant fails to overcome BLM's prima facie case of invalidity when the preponderance of the evidence demonstrates that the claimant never resided on the land, but instead used it about 10 days each year for a few hours for hunting, fishing, berry picking, and gathering wood (never leaving any improvements or other physical signs of use), and that the land was used by other members of the local Native community without the claimant's express or implicit authorization. Under such circumstances, use and

ALASKA--Continued

NATIVE ALLOTMENTS--Continued

occupancy is both intermittent and not potentially exclusive of others.

United States v. Charles Pestrikoff, 134 IBLA 277
(Dec. 6, 1995)

A Native allotment application is properly denied where the preponderance of the evidence establishes that the applicant did not engage in qualifying use and occupancy as an independent citizen, but as a minor child in the company of and under the supervision of his parents and other family members, prior to withdrawal of the land from entry.

United States v. George Jim, Sr., 134 IBLA 294
(Dec. 12, 1995)

TRADE AND MANUFACTURING SITES

A BLM decision rejecting a trade and manufacturing site application will be upheld on appeal, when, given the fact that the applicant had built four cabins and cleared trails on the land, his evidence of revenue from his cabin rental business was sporadic and unsupported by the statement of even one individual who used his facilities during the time period in question.

John C. Phariss, 134 IBLA 37 (Oct. 4, 1995)

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT

GENERALLY

Sec. 905(a)(5) of ANILCA, 43 U.S.C. § 1634(a)(5) (1994), established a specific time limitation for raising objections to the approval of designated Native allotment applications; therefore an individual's protest to BLM's finding that a Native allotment was statutorily approved must be dismissed where it is based on ownership of improvements situated in part on the allotment with no entry of record and was filed more than 180 days following enactment of ANILCA.

Jack C. Vantrease, 133 IBLA 365 (Sept. 14, 1995)

NATIVE ALLOTMENTS

A Native allotment application that is amended, pursuant to sec. 905(c) of ANILCA, to encompass different land (in part) is not legislatively approved as to the land described in the amended application and is properly adjudicated under Act of May 17, 1906, as amended, when a protest meeting the requirements of sec. 905(a)(5) of ANILCA is filed within 60 days following the mailing of notice of the amended description to the State and interested parties even though the protest is addressed solely to the additional land.

Under sec. 905(a)(5)(C) of ANILCA, 43 U.S.C. § 1634(a)(5)(C) (1988), any individual objecting to the applicant's entitlement to a Native allotment must file a protest within the period established by ANILCA and must allege that the land described in the application is the situs of improvements claimed by the person filing the protest. The subsequent withdrawal of such a protest after the close of the protest period does not obviate the requirement to adjudicate the application.

Edward N. O'Leary, 132 IBLA 337 (May 9, 1995)

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

NATIVE ALLOTMENTS--Continued

The right of an Alaska Native allotment applicant, provided by sec. 905(c) of ANILCA, 43 U.S.C. § 1634(c) (1988), to amend the description on his application where it designates land other than that which the applicant intended to claim at the time of application terminates upon the establishment, by the Secretary, after proper notice, of a date certain on which all requests for amendment must be received.

Silas Solomon, 133 IBLA 41 (July 6, 1995)

A Native allotment application that was rejected in 1961 for 156 of the 160 acres claimed, without giving the applicant a hearing on a disputed question of fact, was properly reinstated in 1979, and adjudicated, as required by sec. 905(a) of ANILCA, 43 U.S.C. § 1634(a) (1988).

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A Native allotment application will be considered to have been pending before the Department on or before Dec. 18, 1971, as required by sec. 905(a)(1) of ANILCA where the record contains a copy of a handwritten application signed by the applicant which was date-stamped by BIA prior to that date and which is virtually identical (except for a missing land description) to a typewritten application later filed with BLM.

A materials site right-of-way will be considered a valid existing right within the meaning of sec. 905(a)(1) of ANILCA, and thus not subject to legislative approval, where the land was mineral-in-character during the period of use and occupancy by the Native prior to

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

NATIVE ALLOTMENTS--Continued

the creation of the right-of-way, and thus not available for allotment.

State of Alaska, Dept. of Transportation & Public Facilities (In re Irene Johnson & Jack Craig), 133 IBLA 281 (Aug. 9, 1995)

In order for legislative approval to apply to an allotment application which has been amended pursuant to sec. 905(c) of ANILCA, 43 U.S.C. § 1634(c) (1988), the allotment applicant must first establish that the new description embraces the land for which he or she originally intended to make application.

Under sec. 905(a)(5)(B) of ANILCA, 43 U.S.C. § 1634(a)(5)(B) (1988), the timely filing of a valid protest by the State of Alaska prevents the application from being legislatively approved and requires adjudication of the application under the Native Allotment Act of 1906. The subsequent withdrawal of such a protest does not obviate the statutory requirement to adjudicate the application.

Under sec. 905(a)(5)(C) of ANILCA, 43 U.S.C. § 1634(a)(5)(C) (1988), the timely filing of a valid protest by an individual claiming ownership of improvements on land sought for allotment prevents the application from being legislatively approved and requires adjudication of the application under the Native Allotment Act of 1906. The fact that the improvements may have been constructed on the land without color of right has no bearing on the requirement that the allotment applicant must show qualifying use and occupancy of the land sought.

United States v. Angeline Galbraith, 134 IBLA 75
(Oct. 12, 1995) 102 I.D. 116

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

NATIVE ALLOTMENTS--Continued

Where protests of a Native allotment application were presented prior to passage of sec. 905(a)(5)(C), 43 U.S.C. § 1634(a)(5)(C) (1988), or filed after the 180-day period specified in the Act, both are properly dismissed and will not bar legislative approval of the allotment application.

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Theodore J. Almasy, 134 IBLA 239 (Nov. 29, 1995)

The filing of a legally sufficient State protest pursuant to sec. 905(a)(5)(B) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(5)(B) (1988), precludes a Native allotment application from being legislatively approved under the terms of the statute, even where the protest was subsequently withdrawn.

United States v. Charles Pestrikoff, 134 IBLA 277 (Dec. 6, 1995)

VALID EXISTING RIGHTS

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ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT--Continued

VALID EXISTING RIGHTS--Continued

the creation of the right-of-way, and thus not available for allotment.

State of Alaska, Dept. of Transportation & Public Facilities (In re Irene Johnson & Jack Craig), 133 IBLA 281 (Aug. 9, 1995)

ALASKA NATIVE CLAIMS SETTLEMENT ACT

APPEALS

Standing

Although Departmental regulation 43 CFR 4.412(b) requires a party filing an appeal from a decision involving a selection application under ANCSA to file a statement of standing within 30 days after filing its notice of appeal, the Board's discretionary authority to dismiss such an appeal for failure to file a statement of standing will not be exercised when the property interest on which a party claims standing is identified in the SOR and there is no showing that a procedural deficiency has prejudiced a party.

In an appeal by the State of Alaska from a decision denying reservation of public easements in a historical place conveyance to a Native corporation, the State's allegation that the easements are needed to assure reasonable access to State-owned land below the ordinary high water line indicates a property interest affected by BLM's decision that provides a basis for standing to appeal.

State of Alaska, 132 IBLA 197 (Mar. 29, 1995)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

CONVEYANCES

Cemetery_Sites_and_Historical_Places

In an appeal by the State of Alaska from a decision denying reservation of public easements in a historical place conveyance to a Native corporation, the State's allegation that the easements are needed to assure reasonable access to State-owned land below the ordinary high water line indicates a property interest affected by BLM's decision that provides a basis for standing to appeal.

Although the primary standard for determining whether an easement in a conveyance for a historical place is reasonably necessary is "present existing use," which must be established by Dec. 18, 1976, or the date of selection, whichever is later, Departmental regulation 43 CFR 2650.4-7(a)(3) provides for reservation of public easements absent a demonstration of present existing use if there is no reasonable alternative route or site available, or if the public easement is for access to an isolated tract or area of publicly owned land.

A hearing is properly ordered in an appeal from a decision rejecting an easement in the conveyance of a historical place on the ground that alternative access exists when BLM fails to explain the basis of its decision, the appellant has challenged the reasonableness of the access selected by BLM, and the facts of record are insufficient to determine whether BLM's decision should be affirmed.

A decision rejecting an easement in the conveyance of a historical place on the ground that alternative access exists on the State land below the ordinary high water line will not be affirmed in the absence of a clear explanation of how reasonable access is to be accomplished when the land is submerged.

State of Alaska, 132 IBLA 197 (Mar. 29, 1995)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

CONVEYANCES--Continued

Easements

In an appeal by the State of Alaska from a decision denying reservation of public easements in a historical place conveyance to a Native corporation, the State's allegation that the easements are needed to assure reasonable access to State-owned land below the ordinary high water line indicates a property interest affected by BLM's decision that provides a basis for standing to appeal.

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State of Alaska, 132 IBLA 197 (Mar. 29, 1995)

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

CONVEYANCES--Continued

Regional_Conveyances

Where the Solicitor determines that the Department is without authority to convey certain lands to Alaska villages, and that determination is adopted by the Ass't Secretary for Land and Minerals Management and declared to be the final action of the Department, under Blue Star, Inc., 41 IBLA 333 (1979), the Board of Land Appeals is without jurisdiction to review the matter.

Cook Inlet Region, Inc., 132 IBLA 186 (Mar. 28, 1995)

EASEMENTS

Public_Easements

In an appeal by the State of Alaska from a decision denying reservation of public easements in a historical place conveyance to a Native corporation, the State's allegation that the easements are needed to assure reasonable access to State-owned land below the ordinary high water line indicates a property interest affected by BLM's decision that provides a basis for standing to appeal.

Although the primary standard for determining whether an easement in a conveyance for a historical place is reasonably necessary is "present existing use," which must be established by Dec. 18, 1976, or the date of selection, whichever is later, Departmental regulation 43 CFR 2650.4-7(a)(3) provides for reservation of public easements absent a demonstration of present existing use if there is no reasonable alternative route or site available, or if the public easement is for access to an isolated tract or area of publicly owned land.

A hearing is properly ordered in an appeal from a decision rejecting an easement in the conveyance of a historical place on the ground that alternative access exists when BLM fails to explain the basis of its

ALASKA NATIVE CLAIMS SETTLEMENT ACT--Continued

EASEMENTS--Continued

Public Easements--Continued

decision, the appellant has challenged the reasonableness of the access selected by BLM, and the facts of record are insufficient to determine whether BLM's decision should be affirmed.

A decision rejecting an easement in the conveyance of a historical place on the ground that alternative access exists on the State land below the ordinary high water line will not be affirmed in the absence of a clear explanation of how reasonable access is to be accomplished when the land is submerged.

State of Alaska, 132 IBLA 197 (Mar. 29, 1995)

APPEALS

(See also Administrative Procedure, Contracts, Grazing Permits & Licenses, Indian Probate, Indians, Rules of Practice, Torts, Uniform Relocation Assistance & Real Property Acquisition Policies Act of 1970)

GENERALLY

Where the Solicitor determines that the Department is without authority to convey certain lands to Alaska villages, and that determination is adopted by the Assistant Secretary for Land and Minerals Management and declared to be the final action of the Department, under Blue Star, Inc., 41 IBLA 333 (1979), the Board of Land Appeals is without jurisdiction to review the matter.

Cook Inlet Region, Inc., 132 IBLA 186 (Mar. 28, 1995)

APPEALS--Continued

GENERALLY--Continued

An appeal will be dismissed as untimely when the record fails to establish that the Notice of Appeal was transmitted within the 30-day period established by 43 CFR 4.411(a).

Golden Arc Mining & Refining Inc., 133 IBLA 90 (July 14, 1995)

It is incumbent upon BLM to ensure that its decision is supported by a rational basis and that such basis is stated in the written decision, as well as being demonstrated in the administrative record accompanying the decision. A decision requiring payment of fees for road use under an O&C logging road right-of-way will be set aside where neither the decision nor the case record provide any support for requiring such payment.

Larry Brown & Associates, 133 IBLA 202 (July 27, 1995)

Where a decision clarifying a controlling issue of law issues during the pendency of an appeal, a party may properly amend its SOR to cite that case in support of its appeal.

Where the State of Alaska was not served with a copy of an ALJ's decision overturning a BLM finding that certain lands are mineral-in-character, it is not barred from challenging that finding in its appeal from a subsequent BLM decision granting a Native allotment for those lands. In these circumstances, it is appropriate to refer the matter to the Hearings Division to allow the State the opportunity to do so.

State of Alaska, Dept. of Transportation & Public Facilities (In re Irene Johnson & Jack Craig), 133 IBLA 281 (Aug. 9, 1995)

APPEALS--Continued

GENERALLY--Continued

A party will not be accorded standing to appeal from a BLM decision where it does not demonstrate that it has a legally cognizable interest which has been adversely affected by that decision. Where a party appeals a BLM ROD approving a habitat management plan that, by itself, has no adverse consequences, actual or threatened, because it does not finally implement the challenged approved alternatives but rather identifies the additional actions necessary to implement the plan, including the opportunities for affected parties to participate in and appeal from the final implementation actions, the party lacks standing to appeal because it has not yet been adversely affected by BLM's decision, and its appeal is properly dismissed.

Petroleum Ass'n of Wyoming, et al., 133 IBLA 337 (Sept. 7, 1995)

An administrative decision is properly set aside and remanded if it is not supported by a case record providing the Board the information necessary for an objective, independent review of the basis for decision.

Great Western Onshore Inc., 133 IBLA 386 (Sept. 22, 1995)

An appeal supported by a SOR which does not meet the Department's rules of practice may be dismissed. However, dismissal is not mandatory and each case will be considered individually.

Mustang Fuel Corp., 134 IBLA 1 (Sept. 26, 1995)

APPEALS--Continued

JURISDICTION

The Board has no jurisdiction over appeals from the approval or amendment of an RMP, but only over actions implementing such a plan. 43 CFR 1610.5-2; 43 CFR 1610.5-3. A "Planning Update" distributed by a BLM resource area manager which was relative to the resource management planning process and was preliminary to issuance of a final RMP is not subject to administrative review by the Board of Land Appeals because actions described therein are not actions implementing an RMP or some portion thereof. 43 CFR 1610.5-3(b).

Southern Utah Wilderness Alliance, American Rivers,
132 IBLA 255 (Apr. 19, 1995)

Departmental regulation 43 CFR 4.410 provides a right of appeal to the Board to any party adversely affected by a decision of an officer of BLM. When BLM issues a decision approving a right-of-way across public lands for segments of a natural gas pipeline that would transport gas from Canada, based on an EIS prepared by FERC as the "lead agency," and the party appealing BLM's decision alleges injury arising from the failure of the EIS to consider the socioeconomic effects of importing gas from Canada, that party will be deemed to have been adversely affected by the FERC decision rather than that of BLM, and the appeal is properly dismissed.

When the FERC issues a certificate of convenience and necessity for a natural gas pipeline that crossing public land and a petition for judicial review of the certificate is filed with the appropriate U.S. Court of Appeals, the exclusive judicial review provision of 15 U.S.C. § 717r (1988), does not deprive the Secretary of the Interior of his authority to review a decision of a subordinate approving a right-of-way for the pipeline. A motion to dismiss an appeal to the Board of Land Appeals (which exercises the Secretary's delegated administrative review authority) claiming the appeal to

APPEALS--Continued

JURISDICTION--Continued

be a collateral attack on a FERC certificate authorizing the pipeline is properly denied.

BLM's failure to seek designation of an area as a historical landscape does not, by itself, constitute an "identifiable decision" subject to appeal under 43 CFR 4.410. To the extent that designation of an historical landscape would require its proposal as an area of critical environmental concern, the proposal must be made through BLM's land-use planning process. The Board does not have jurisdiction to consider appeals from the approval or amendment of a RMP and cannot gain jurisdiction until action is taken to implement the plan.

Wyoming Independent Producers Ass'n, Independent Petroleum Ass'n of Mountain States, Wyoming Outdoor Council, National Trust for Historic Preservation,
133 IBLA 65 (July 13, 1995)

Although the Board of Land Appeals has no jurisdiction to review appeals of decisions to approve or amend a RMP, approval of an activity plan designed to implement a RMP is appealable to the Board.

Petroleum Ass'n of Wyoming, et al., 133 IBLA 337
(Sept. 7, 1995)

APPLICATIONS AND ENTRIES

GENERALLY

An EA of the effects of leasing public lands under the Recreation and Public Purposes Act, 43 U.S.C. § 869-1 (1988), for use as a shooting range, that failed to adequately consider the effect of shooting noises on

APPLICATIONS AND ENTRIES--Continued

GENERALLY--Continued

nearby homeowners provided an insufficient basis for finding that a lease should issue.

Mary Coles et al., 132 IBLA 398 (June 15, 1995)

APPRAISALS

Generally, the proper appraisal method for determining the fair market rental value of nonlinear rights-of-way, including communication sites, is the comparable lease method of appraisal. An appraisal of fair market rental value for a communication site right-of-way will be affirmed on appeal if an appellant fails to show error in the appraisal methods used or fails to show by a preponderance of the evidence that the charges are in excess of the fair market rental value.

Where an appraisal is undertaken for the purpose of determining the initial rental for a communication site right-of-way which has already issued, the fair market value must be calculated as of the date of the issuance of the right-of-way and not as of the date of the appraisal.

Oroville-Wyandotte Irrigation District, 131 IBLA 379 (Jan. 9, 1995)

BLM properly requires the holder of a communication site right-of-way to pay rental charges, in addition to those originally estimated at the time of issuance of the right-of-way grant, based upon an appraisal of the fair market rental value of the right-of-way grant. A delay of over 2 years between issuance of the right-of-way grant and notification to the holder of the

APPRAISALS--Continued

appraised rental value does not relieve the right-of-way holder of the obligation to pay the appraised rental charges.

Generally, the proper appraisal method for determining the fair market rental value of nonlinear rights-of-way, including communication sites, is the comparable lease method of appraisal. An appraisal of a right-of-way grant will not be set aside unless BLM has erred in applying the proper criteria to calculate the fair market rental value or the appellant demonstrates that the resulting charges are excessive. Absent a showing of error in the appraisal methods utilized, an appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive.

Michael D. Dahmer, 132 IBLA 17 (Jan. 23, 1995)

An appraisal of fair market value for a land-use permit issued pursuant to sec. 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1988), will be affirmed unless an appellant either demonstrates error in the appraisal method or presents convincing evidence that the charge is excessive.

C Bar C Ranch Partnership, 132 IBLA 261 (Apr. 21, 1995)

The role of the Board of Indian Appeals in reviewing a BIA determination of fair rental value is to determine whether the decision is reasonable; that is, whether it is supported by law and substantial evidence. An appellant who challenges a rental adjustment for a lease of Indian land bears the burden of proving that the adjustment is unreasonable.

Richard Gossett, Audrey Pentz, Judith Booth, Stewart Hutt, Richard Wells, & Kenneth McDonald v. Portland Area Director, Bureau of Indian Affairs, 28 IBIA 72 (June 19, 1995)

APPRAISALS--Continued

BLM's determination of the fair market rental for a right-of-way for a hydroelectric project will be affirmed where the holder fails to demonstrate, by a preponderance of the evidence, that BLM's appraisal methodology (assessing a percentage of the gross income received from the sale of electricity generated by the project) was improper; that it used inappropriate data, erred in its calculations, or otherwise arrived at a rental that deviated from fair market value; or that the rental should be reduced or waived since the holder provides a valuable benefit to the public.

Lateral 10 Ventures Limited Partnership, 133 IBLA 268 (Aug. 7, 1995)

ATTORNEY FEES

GENERALLY

The BIA regulation implementing 25 U.S.C. § 1912(b) (1994), does not authorize Bureau payment of attorney fees in voluntary child custody proceedings in State courts. 25 CFR 23.13.

Karen Spears v. Sacramento Area Director, Bureau of Indian Affairs, 28 IBIA 161 (Sept. 8, 1995)

BOARD OF INDIAN APPEALS

GENERALLY

Although the Board of Indian Appeals has jurisdiction over an appeal from a BIA Area Director's approval of a tribal ordinance, it has authority to

BOARD OF INDIAN APPEALS--Continued

GENERALLY--Continued

abstain in a case where it finds that primary jurisdiction lies with a tribal court.

Zinke & Trumbo, Ltd; Enron Oil & Gas Co.; Quinex Energy Corp.; Wasatch Well Service, Inc.; Geoscout Land & Title Co.; Payne Land Services; Questar Pipeline Co., et al.; & Gary-Williams Energy Corp. v. Phoenix Area Director, Bureau of Indian Affairs, 27 IBIA 105 (Jan. 5, 1995)

In a case where exhaustion of tribal remedies is required, appellants before the Board of Indian Appeals cannot avoid the requirement simply by alleging that the tribal court lacks jurisdiction over the matter at issue. Instead, they must take the matter to the tribal court so that the court may determine its own jurisdiction.

The Board of Indian Appeals is not required to consider evidence presented for the first time on appeal.

Ken Mosay & Mary Washington v. Minneapolis Area Director, Bureau of Indian Affairs, 27 IBIA 126 (Jan. 19, 1995)

The role of the Board of Indian Appeals in reviewing a BIA determination of fair rental value is to determine whether the decision is reasonable; that is, whether it is supported by law and substantial evidence. An appellant who challenges a rental adjustment for a lease of Indian land bears the burden of proving that the adjustment is unreasonable.

Richard Gossett, Audrey Pentz, Judith Booth, Stewart Hutt, Richard Wells, & Kenneth McDonald v. Portland Area Director, Bureau of Indian Affairs, 28 IBIA 72 (June 19, 1995)

BOARD OF INDIAN APPEALS--Continued

GENERALLY--Continued

The Board of Indian Appeals will not consider arguments that could and should have been raised in prior litigation concerning the identical subject matter.

The Board of Indian Appeals is not required to consider evidence and arguments raised for the first time in a reply brief.

Winlock Veneer Co. v. Juneau Area Director, Bureau of Indian Affairs, 28 IBIA 149 (Sept. 5, 1995)

In a case where exhaustion of tribal remedies is required, appellants before the Board of Indian Appeals cannot avoid the requirement simply by alleging that the tribal court would be biased against them.

Raymond Gonzales et al., Elmer Torres et al. v. Acting Albuquerque Area Director, Bureau of Indian Affairs, 28 IBIA 229 (Oct. 23, 1995)

In some circumstances, where individual Indian landowners have authorized the inclusion of their land in a grazing unit and have also authorized a BIA Superintendent to take certain actions on their behalf, the landowners may be deemed to have authorized the Superintendent to represent them in an appeal before the Board of Indian Appeals. However, the Board must determine, on a case-by-case basis, whether such representation is appropriate.

Ted Lopez, Luke Lopez, and David Lopez v. Acting Aberdeen Area Director, Bureau of Indian Affairs, 29 IBIA 5 (Dec. 12, 1995)

BOARD OF INDIAN APPEALS--Continued

JURISDICTION

In resolving intra-tribal disputes, nonjudicial tribal institutions have been recognized as competent law-applying bodies.

Jeff Hunt; John Gray & Desiree Gray; Ramon L. ("Sharky") Williams & Ramona Williams; Vivian T. Sampson & Celinda Traversie; Rusty Brehmer; Marty Lawrence; Tina Clement; Sharon Eaton; & Jeff Hunt & Vicki Hunt v. Aberdeen Area Director, Bureau of Indian Affairs, 27 IBIA 173 (Feb. 9, 1995)

Decisions concerning whether a tribe's application for a Small Tribes grant should be funded are committed to the discretion of BIA. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Allakaket Village Council, Grayling IRA Council, Koyukuk Tribal Council, & Alatna Village Council, 27 IBIA 190 (Mar. 3, 1995)

In reviewing a BIA decision concerning whether an allotment should be partitioned, the Board of Indian Appeals does not substitute its judgment for that of the Bureau. Rather, the Board's responsibility is to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Kenneth W. Davis v. Acting Aberdeen Area Director, Bureau of Indian Affairs, 27 IBIA 281 (Apr. 6, 1995)

BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

A BIA ruling concerning an appellant's standing is a legal conclusion subject to full review by the Board of Indian Appeals, even though it is part of an otherwise discretionary decision made by the Bureau.

Muscogee (Creek) Nation v. Muskogee Area Director, Bureau of Indian Affairs, 28 IBIA 24 (May 18, 1995)

Where BIA regulations provide for appeals of certain decisions to the Ass't Secretary--Indian Affairs, the Ass't Secretary may refer the appeal to the Board of Indian Appeals under 43 CFR 4.330(a)(2). Absent a referral, however, the Board lacks jurisdiction over such appeals.

Karen Spears v. Sacramento Area Director, Bureau of Indian Affairs, 28 IBIA 161 (Sept. 8, 1995)

The BIA's definition of a "former reservation" under 25 CFR 151.2(f), for purposes of acquisition of land in trust for Indians, is subject to de novo review by the Board of Indian Appeals.

Citizen Band Potawatomi Indian Tribe of Oklahoma v. Anadarko Area Director, Bureau of Indian Affairs, 28 IBIA 169 (Sept. 12, 1995)

BOARD OF INDIAN APPEALS--Continued

JURISDICTION--Continued

The Board of Indian Appeals lacks authority to declare an act of Congress unconstitutional.

Wyandotte Tribe of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs, 28 IBIA 247 (Oct. 25, 1995)

The Board of Indian Appeals is not a court of general jurisdiction, but has only that authority delegated to it by the Secretary of the Interior. It has not been delegated authority to determine the validity of a deed to trust land or to rewrite such a deed.

Cherokee Nation v. Acting Muskogee Area Director, Bureau of Indian Affairs, 29 IBIA 17 (Dec. 15, 1995)

BOARD OF LAND APPEALS

Under 43 CFR 4.21(a), a decision will be effective on the day after the expiration of the time during which a person adversely affected may file a notice of appeal unless a petition for stay pending appeal is filed with the notice of appeal.

Kay Papulak, 132 IBLA 117 (Mar. 1, 1995)

The Board has no jurisdiction over appeals from the approval or amendment of an RMP, but only over actions implementing such a plan. 43 CFR 1610.5-2; 43 CFR 1610.5-3. A "Planning Update" distributed by a BLM resource area manager which was relative to the resource management planning process and was preliminary to issuance of a final RMP is not subject to administrative

BOARD OF LAND APPEALS--Continued

review by the Board of Land Appeals because actions described therein are not actions implementing an RMP or some portion thereof. 43 CFR 1610.5-3(b).

Southern Utah Wilderness Alliance, American Rivers,
132 IBLA 255 (Apr. 19, 1995)

BLM's failure to seek designation of an area as a historical landscape does not, by itself, constitute an "identifiable decision" subject to appeal under 43 CFR 4.410. To the extent that designation of an historical landscape would require its proposal as an area of critical environmental concern, the proposal must be made through BLM's land-use planning process. The Board does not have jurisdiction to consider appeals from the approval or amendment of a RMP and cannot gain jurisdiction until action is taken to implement the plan.

Wyoming Independent Producers Ass'n, Independent Petroleum Ass'n of Mountain States, Wyoming Outdoor Council, National Trust for Historic Preservation,
133 IBLA 65 (July 13, 1995)

Although the Board of Land Appeals has no jurisdiction to review appeals of decisions to approve or amend a RMP, approval of an activity plan designed to implement a RMP is appealable to the Board.

Petroleum Ass'n of Wyoming, et al., 133 IBLA 337
(Sept. 7, 1995)

BUREAU OF INDIAN AFFAIRS
(See also Indian Probate)

GENERALLY

The BIA is bound by the terms of leases it has approved, when the leases are not in conflict with governing regulations. Where such a lease clearly provides for the forfeiture of certain rights, the Bureau lacks authority to grant relief from forfeiture over the objection of a party to the lease and/or a party for whose benefit the forfeiture provision was included in the lease.

Kearny Street Real Estate Co., L. P. v. Sacramento Area Director, Bureau of Indian Affairs, 28 IBIA 4 (May 16, 1995)

ADMINISTRATIVE APPEALS

Generally

In appeals arising under 25 CFR Part 2, interested parties are entitled to respond to an appellant's argument by filing an answer under 25 CFR 2.11. Therefore, a BIA Area Director may not issue a decision in an appeal prior to expiration of the time for filing answers in sec. 2.11.

Kearny Street Real Estate Co., L. P. v. Sacramento Area Director, Bureau of Indian Affairs, 28 IBIA 4 (May 16, 1995)

In deciding an appeal pending before him or her, a BIA official has the authority and the responsibility to consider all statutory and regulatory provisions relevant to the matter at issue, whether or not the appellant has relied upon those provisions.

Muscogee (Creek) Nation v. Muskogee Area Director, Bureau of Indian Affairs, 28 IBIA 24 (May 18, 1995)

BUREAU OF INDIAN AFFAIRS--Continued

ADMINISTRATIVE APPEALS--Continued

Generally--Continued

Regulations in 25 CFR 2.12 and 43 CFR 4.332 require the BIA to assist an Indian or Indian tribal appellant not represented by counsel in regard to an appeal. This assistance consists of serving the appellant's filings on interested parties and allowing access to Government records and other documents. It does not include obtaining an attorney for the appellant or acting as the appellant's attorney by preparing the appellant's appeal documents or otherwise advising the appellant on the merits of the appeal.

Rose Evans v. Sacramento Area Director, Bureau of Indian Affairs, 28 IBIA 124 (Aug. 1, 1995)

Where BIA regulations provide for appeals of certain decisions to the Ass't Secretary--Indian Affairs, the Ass't Secretary may refer the appeal to the Board of Indian Appeals under 43 CFR 4.330(a)(2). Absent a referral, however, the Board lacks jurisdiction over such appeals.

Under 25 CFR 2.7(a), it is the responsibility of a BIA deciding official to give notice of the decision to all interested parties known to the official.

Where a BIA regulation requires that a decision be issued within a certain time, the Board of Indian Appeals will not find the Bureau estopped by its delay in issuing a decision where the party seeking estoppel had a regulatory right to appeal from the Bureau's delay but failed to exercise that right.

Karen Spears v. Sacramento Area Director, Bureau of Indian Affairs, 28 IBIA 161 (Sept. 8, 1995)

BUREAU OF LAND MANAGEMENT
(See also Mineral Leasing Act)

A special recreation permit holder is subject to any permit condition or stipulation BLM deems necessary to protect the public interest, and where a commercial river rafting permit holder is on notice that violation of party size restrictions may result in sanctions, BLM may invoke such sanctions upon noncompliance.

Carrol White, 132 IBLA 141 (Mar. 16, 1995)

To the extent that cadastral surveyors employed by BLM conduct a dependent resurvey of the public lands of the United States, pursuant to 43 U.S.C. § 772 (1988), to mark the boundaries of undisposed lands, a state licensing authority may not impose its requirements on such employees when they are engaged within the scope of their official duties.

Thom Seal et al., 132 IBLA 244 (Apr. 17, 1995)

COAL LEASES AND PERMITS
(See also Mineral Leasing Act)

GENERALLY

Neither the MLA, 30 U.S.C. § 207(a) (1988), nor coal exploration and mining operations rules codified at 43 CFR Part 3480 authorize BLM to require a Federal coal lessee to pay for the full value of coal by-passed during mining operations; furthermore, in the absence of a lease provision authorizing such a penalty, it may not be imposed, regardless of whether there has been a deviation from the applicable mine plan of operations.

PacifiCorp, 132 IBLA 98 (Feb. 22, 1995)

COAL LEASES AND PERMITS--Continued

GENERALLY--Continued

If a coal lessee does not appeal a stipulation of a lease when it is issued, it may not later appeal a notice of noncompliance with the stipulation on the ground that BLM is not authorized to impose the stipulation.

BLM may enforce a special stipulation in a coal lease, for the protection of a Federal reservoir, on surface lands which are privately owned.

Ark Land Co., 133 IBLA 31 (July 3, 1995)

A clause in a Federal coal lease stating it is issued "pursuant and subject to" all regulations of the Secretary of the Interior "now or hereafter in force" incorporates subsequent regulations relating to diligent development, continuous operations, and advanced royalty requirements.

Cyprus Western Coal Co. (On Judicial Remand), 133 IBLA 52 (July 11, 1995)

CONTINUED OPERATION

A force majeure exception to the requirement of continued operation of coal leases under sec. 7(b) of the MLA to maintain production in commercial quantities is properly recognized when operations under the lease are interrupted by a landslide within the pit which causes operations to be barred as unsafe. When the lease is subsequently found to be mined out on the ground that remaining coal reserves are not recoverable, a decision to deny a refund of advance royalties tendered for periods subsequent to the events which barred mining will be reversed.

Ark Land Co., 132 IBLA 235 (Apr. 13, 1995)

COAL LEASES AND PERMITS--Continued

LEASES

Neither the MLA, 30 U.S.C. § 207(a) (1988), nor coal exploration and mining operations rules codified at 43 CFR Part 3480 authorize BLM to require a Federal coal lessee to pay for the full value of coal by-passed during mining operations; furthermore, in the absence of a lease provision authorizing such a penalty, it may not be imposed, regardless of whether there has been a deviation from the applicable mine plan of operations.

PacifiCorp, 132 IBLA 98 (Feb. 22, 1995)

If a coal lessee does not appeal a stipulation of a lease when it is issued, it may not later appeal a notice of noncompliance with the stipulation on the ground that BLM is not authorized to impose the stipulation.

BLM may enforce a special stipulation in a coal lease, for the protection of a Federal reservoir, on surface lands which are privately owned.

Ark Land Co., 133 IBLA 31 (July 3, 1995)

ROYALTIES

A force majeure exception to the requirement of continued operation of coal leases under sec. 7(b) of the MLA to maintain production in commercial quantities is properly recognized when operations under the lease are interrupted by a landslide within the pit which causes operations to be barred as unsafe. When the lease is subsequently found to be mined out on the ground that remaining coal reserves are not recoverable, a decision to deny a refund of advance royalties tendered for periods subsequent to the events which barred mining will be reversed.

Ark Land Co., 132 IBLA 235 (Apr. 13, 1995)

COAL LEASES AND PERMITS--Continued

ROYALTIES--Continued

Black lung excise taxes are properly considered to be an element of the costs of mining and, as such, will not be allowed to be deducted from value for royalty computation purposes.

Meadowlark, Inc., 133 IBLA 5 (June 29, 1995)

Where the record is inadequate to determine whether, in fact, appellant met the diligent development requirement under subsequent regulations incorporated in the lease, the matter will be remanded to MMS to compute royalty due.

Cyprus Western Coal Co. (On Judicial Remand), 133 IBLA 52 (July 11, 1995)

TERMINATION

A BLM decision is reversed because it terminated a logical mining unit composed of four Federal coal leases without first affording the Federal lessee concerned a 30-day notice of termination, contrary to provision of the LMU.

Evans Coal Co., 134 IBLA 291 (Dec. 7, 1995)

COMMUNICATION SITES

Generally, the proper appraisal method for determining the fair market rental value of nonlinear rights-of-way, including communication sites, is the comparable lease method of appraisal. An appraisal of fair market rental value for a communication site right-of-way will be affirmed on appeal if an appellant fails to show error in the appraisal methods used or fails to show by

COMMUNICATION SITES--Continued

a preponderance of the evidence that the charges are in excess of the fair market rental value.

Where an appraisal is undertaken for the purpose of determining the initial rental for a communication site right-of-way which has already issued, the fair market value must be calculated as of the date of the issuance of the right-of-way and not as of the date of the appraisal.

Oroville-Wyandotte Irrigation District, 131 IBLA 379
(Jan. 9, 1995)

An application for communications site right-of-way is properly rejected as not in the public interest where BLM determines that an existing Federal right-of-way provides adequate capacity for the applicant's radio transmitting and receiving equipment, and that granting the application would result in unnecessary proliferation of communications equipment and resulting adverse impact on visual resources. BLM is not required to issue another right-of-way to foster economic competition or to permit the applicant to avoid rents charged by the current right-of-way holder.

SMR Network, Inc., 131 IBLA 384 (Jan. 9, 1995)

BLM properly requires the holder of a communication site right-of-way to pay rental charges, in addition to those originally estimated at the time of issuance of the right-of-way grant, based upon an appraisal of the fair market rental value of the right-of-way grant. A delay of over 2 years between issuance of the right-of-way grant and notification to the holder of the appraised rental value does not relieve the right-of-way holder of the obligation to pay the appraised rental charges.

Generally, the proper appraisal method for determining the fair market rental value of nonlinear rights-of-way, including communication sites, is the comparable

COMMUNICATION SITES--Continued

lease method of appraisal. An appraisal of a right-of-way grant will not be set aside unless BLM has erred in applying the proper criteria to calculate the fair market rental value or the appellant demonstrates that the resulting charges are excessive. Absent a showing of error in the appraisal methods utilized, an appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive.

Michael D. Dahmer, 132 IBLA 17 (Jan. 23, 1995)

CONSTITUTIONAL LAW

GENERALLY

The Board of Indian Appeals lacks authority to declare an act of Congress unconstitutional.

Wyandotte Tribe of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs, 28 IBIA 247 (Oct. 25, 1995)

CONTESTS AND PROTESTS

(See also Administrative Procedure, Rules of Practice)

GENERALLY

Sec. 905(a)(5) of ANILCA, 43 U.S.C. § 1634(a)(5) (1994), established a specific time limitation for raising objections to the approval of designated Native allotment applications; therefore an individual's protest to BLM's finding that a Native allotment was statutorily approved must be dismissed where it is based on ownership of improvements situated in part on the

CONTESTS AND PROTESTS--Continued

GENERALLY--Continued

allotment with no entry of record and was filed more than 180 days following enactment of ANILCA.

Jack C. Vantrease, 133 IBLA 365 (Sept. 14, 1995)

Where the Government files a contest complaint against a Native allotment application, the Government bears the burden of presenting a prima facie case establishing that evidence of record does not affirmatively show compliance with all of the statutory and regulatory requirements necessary to obtain title to a Native allotment under the Native Allotment Act of 1906.

United States v. Angeline Galbraith, 134 IBLA 75
(Oct. 12, 1995) 102 I.D. 116

Where protests of a Native allotment application were presented prior to passage of sec. 905(a)(5)(C), 43 U.S.C. § 1634(a)(5)(C) (1988), or filed after the 180-day period specified in the Act, both are properly dismissed and will not bar legislative approval of the allotment application.

Theodore J. Almasy, 134 IBLA 239 (Nov. 29, 1995)

CONTRACTS

(See also Appeals, Claims Against the United States,
Delegation of Authority, Labor, Rules of Practice)

CONSTRUCTION AND OPERATION

Actions of Parties

Appellant failed to meet its burden to prove that BOR breached its implied contractual duty to cooperate. BOR responded to appellant's requests by contract modifications and otherwise sought to cooperate. Its decision not to retest cable was a disagreement with appellant, not a failure to cooperate. Finally, although BOR did not secure the prompt delivery of electrical data from other contractors, appellant did not prove that this caused it extra, uncompensated, costs.

Appeal of Phoenix Control Systems, Inc., IBCA-2844
(Dec. 6, 1995) 102 I.D. 150

Changes and Extras

The Board held that the contractor was entitled to an equitable adjustment for a constructive contract change under the Changes clause and remanded the appeals to the parties for resolution of quantum.

Appeals of TECOM, Inc., IBCA-2970 a-1 (Mar. 21, 1995)
102 I.D. 17

Appellant's contract with BOR required that it "H-88 load" telemetry cable to reduce attenuation on a computer-controlled water supply system's communication line. In its delay claim, appellant failed to meet its burdens to prove that data forwarded by BOR to accomplish the loading was defective and responsible for the loaded line's failure to function

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Changes and Extras--Continued

properly, and that appellant had incurred damages chargeable to BOR.

Appellant did not carry its burden to prove that differing site conditions, such as the actual locations of cable manholes versus those approximated in the contract, caused it extra, uncompensated costs. Appellant was paid by contract modifications for extra work due to differing site conditions. It did not maintain separate accounts for alleged extra costs, although cost substantiation was a contract requirement, and it did not link alleged liability to alleged damages.

Appellant failed to meet its burden to prove that BOR breached its implied contractual duty to cooperate. BOR responded to appellant's requests by contract modifications and otherwise sought to cooperate. Its decision not to retest cable was a disagreement with appellant, not a failure to cooperate. Finally, although BOR did not secure the prompt delivery of electrical data from other contractors, appellant did not prove that this caused it extra, uncompensated, costs.

Appeal of Phoenix Control Systems, Inc., IBCA-2844
(Dec. 6, 1995) 102 I.D. 150

When the Government conceded that it was responsible for several days of delay and for some damage under appellant's contract to perform site grading and base preparation for fiberglass raceway tanks for fish, but appellant did not prove its damages with precision, the Board used a jury verdict approach in sustaining appellant's appeal in part, because (1) injury was acknowledged; (2) there was no more reliable method for

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Changes and Extras--Continued

computing damages; and (3) the evidence was sufficient to make a fair and reasonable approximation of damages.

Appeal of J&D Enterprises, Inc., IBCA 3506-95-E
(Dec. 8, 1995)

Clauses

Option clauses are strictly construed; to bind a contractor, the Government's notice of option exercise must be unconditional and exactly in accord with the option terms.

Although within the contract's option exercise time period, the contracting officer's telefax cover sheet and accompanying proposed bilateral modification, which addressed several matters in addition to the option, did not qualify as the contractually required written notice of option exercise. The cover sheet did not refer specifically to the option exercise and the modification was conditional because it was undated, unsigned, and marked "DRAFT."

Consistent with the parties' contemporaneous and current interpretation and basic principles that a contract is to be construed reasonably and to harmonize its provisions, the contract's statement that the Government was to give written notice of option exercise "within thirty" days of the contract's expiration date meant that the notice had to be provided within a 30-day period prior to and including the expiration date.

Although the contract was silent on the issue, under basic option law, notice of option exercise is deemed effective when the contractor receives it. The Government bears the burden to prove timeliness. The contracting officer's timely oral notice to the contractor, coupled with an untimely unilateral modification which purported to exercise the option, did not

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Clauses--Continued

comply with the contract's requirement for timely written notice.

The Board held that the contractor was entitled to an equitable adjustment for a constructive contract change under the Changes clause and remanded the appeals to the parties for resolution of quantum.

Appeals of TECOM, Inc., IBCA-2970 a-1 (Mar. 21, 1995)
102 I.D. 17

Contract_Clauses

Generally worded text of release of claims provision in Aug. 1990 contract modification, when preponderance of evidence demonstrated that no claim was pending at the time of the modification, did not bar a specific defective specification, changes and delay claim, first submitted to contracting officer in Mar. 1993.

Appeals of Gardner Zemke Co., IBCA-3261 (Sept. 11, 1995)
102 I.D. 103

Differing_Site_Conditions (Changed_Conditions)

Appellant did not carry its burden to prove that differing site conditions, such as the actual locations of cable manholes versus those approximated in the contract, caused it extra, uncompensated costs. Appellant was paid by contract modifications for extra work due to differing site conditions. It did not maintain separate accounts for alleged extra costs, although cost substantiation was a contract

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Differing Site Conditions (Changed Conditions)--Continue

requirement, and it did not link alleged liability to alleged damages.

Appeal of Phoenix Control Systems, Inc., IBCA-2844
(Dec. 6, 1995) 102 I.D. 150

Drawings and Specifications

Appellant's contract with BOR required that it "H-88 load" telemetry cable to reduce attenuation on a computer-controlled water supply system's communication line. In its delay claim, appellant failed to meet its burdens to prove that data forwarded by BOR to accomplish the loading was defective and responsible for the loaded line's failure to function properly, and that appellant had incurred damages chargeable to BOR.

Appellant did not carry its burden to prove that differing site conditions, such as the actual locations of cable manholes versus those approximated in the contract, caused it extra, uncompensated costs. Appellant was paid by contract modifications for extra work due to differing site conditions. It did not maintain separate accounts for alleged extra costs, although cost substantiation was a contract requirement, and it did not link alleged liability to alleged damages.

Appeal of Phoenix Control Systems, Inc., IBCA-2844
(Dec. 6, 1995) 102 I.D. 150

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Intent of Parties

Consistent with the parties' contemporaneous and current interpretation and basic principles that a contract is to be construed reasonably and to harmonize its provisions, the contract's statement that the Government was to give written notice of option exercise "within thirty" days of the contract's expiration date meant that the notice had to be provided within a 30-day period prior to and including the expiration date.

Appeals of TECOM, Inc., IBCA-2970 a-1 (Mar. 21, 1995)
102 I.D. 17

Notices

Option clauses are strictly construed; to bind a contractor, the Government's notice of option exercise must be unconditional and exactly in accord with the option terms.

Although within the contract's option exercise time period, the contracting officer's telefax cover sheet and accompanying proposed bilateral modification, which addressed several matters in addition to the option, did not qualify as the contractually required written notice of option exercise. The cover sheet did not refer specifically to the option exercise and the modification was conditional because it was undated, unsigned, and marked "DRAFT."

Consistent with the parties' contemporaneous and current interpretation and basic principles that a contract is to be construed reasonably and to harmonize its provisions, the contract's statement that the Government was to give written notice of option exercise "within thirty" days of the contract's expiration date meant

CONTRACTS--Continued

CONSTRUCTION AND OPERATION--Continued

Notices--Continued

that the notice had to be provided within a 30-day period prior to and including the expiration date.

Although the contract was silent on the issue, under basic option law, notice of option exercise is deemed effective when the contractor receives it. The Government bears the burden to prove timeliness. The contracting officer's timely oral notice to the contractor, coupled with an untimely unilateral modification which purported to exercise the option, did not comply with the contract's requirement for timely written notice.

Appeals of TECOM, Inc., IBCA-2970 a-1 (Mar. 21, 1995)
102 I.D. 17

Waiver and Estoppel

The contractor had not accepted a new contract offer, and was not estopped from challenging, and had not waived, the Government's defective option exercise by continuing to perform for about 4 months before objecting. The contractor disputed the option exercise as soon as it became aware that it was deficient; the contract required continued performance in the event of a dispute or claimed contract change; and the Government did not demonstrate prejudice by the minimal delay.

Appeals of TECOM, Inc., IBCA-2970 a-1 (Mar. 21, 1995)
102 I.D. 17

CONTRACTS--Continued

DISPUTES AND REMEDIES

Burden_of Proof

Although the contract was silent on the issue, under basic option law, notice of option exercise is deemed effective when the contractor receives it. The Government bears the burden to prove timeliness. The contracting officer's timely oral notice to the contractor, coupled with an untimely unilateral modification which purported to exercise the option, did not comply with the contract's requirement for timely written notice.

Appeals of TECOM, Inc., IBCA-2970 a-1 (Mar. 21, 1995)
102 I.D. 17

Appellant's contract with BOR required that it "H-88 load" telemetry cable to reduce attenuation on a computer-controlled water supply system's communication line. In its delay claim, appellant failed to meet its burdens to prove that data forwarded by BOR to accomplish the loading was defective and responsible for the loaded line's failure to function properly, and that appellant had incurred damages chargeable to BOR.

Appellant did not carry its burden to prove that differing site conditions, such as the actual locations of cable manholes versus those approximated in the contract, caused it extra, uncompensated costs. Appellant was paid by contract modifications for extra work due to differing site conditions. It did not maintain separate accounts for alleged extra costs, although cost substantiation was a contract requirement, and it did not link alleged liability to alleged damages.

Appellant failed to meet its burden to prove that BOR breached its implied contractual duty to cooperate. BOR responded to appellant's requests by contract modifications and otherwise sought to cooperate. Its decision not to retest cable was a disagreement with appellant, not a failure to cooperate. Finally,

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Burden_of Proof--Continued

although BOR did not secure the prompt delivery of electrical data from other contractors, appellant did not prove that this caused it extra, uncompensated, costs.

Appeal of Phoenix Control Systems, Inc., IBCA-2844
(Dec. 6, 1995) 102 I.D. 150

When the Government conceded that it was responsible for several days of delay and for some damage under appellant's contract to perform site grading and base preparation for fiberglass raceway tanks for fish, but appellant did not prove its damages with precision, the Board used a jury verdict approach in sustaining appellant's appeal in part, because (1) injury was acknowledged; (2) there was no more reliable method for computing damages; and (3) the evidence was sufficient to make a fair and reasonable approximation of damages.

Appeal of J&D Enterprises, Inc., IBCA 3506-95-E
(Dec. 8, 1995)

Damages

Generally

Appellant's contract with BOR required that it "H-88 load" telemetry cable to reduce attenuation on a computer-controlled water supply system's communication line. In its delay claim, appellant failed to meet its burdens to prove that data forwarded by BOR to accomplish the loading was defective and responsible for the loaded line's failure to function properly, and that appellant had incurred damages chargeable to BOR.

Appellant did not carry its burden to prove that differing site conditions, such as the actual

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Damages--Continued

Generally--Continued

locations of cable manholes versus those approximated in the contract, caused it extra, uncompensated costs. Appellant was paid by contract modifications for extra work due to differing site conditions. It did not maintain separate accounts for alleged extra costs, although cost substantiation was a contract requirement, and it did not link alleged liability to alleged damages.

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Appeal of J&D Enterprises, Inc., IBCA 3506-95-E
(Dec. 8, 1995)

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Equitable Adjustments

The Board held that the contractor was entitled to an equitable adjustment for a constructive contract change under the Changes clause and remanded the appeals to the parties for resolution of quantum.

Appeals of TECOM, Inc., IBCA-2970 a-1 (Mar. 21, 1995)
102 I.D. 17

Appellant's contract with BOR required that it "H-88 load" telemetry cable to reduce attenuation on a computer-controlled water supply system's communication line. In its delay claim, appellant failed to meet its burdens to prove that data forwarded by BOR to accomplish the loading was defective and responsible for the loaded line's failure to function properly, and that appellant had incurred damages chargeable to BOR.

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Appellant failed to meet its burden to prove that BOR breached its implied contractual duty to cooperate. BOR responded to appellant's requests by contract modifications and otherwise sought to cooperate. Its decision not to retest cable was a disagreement with appellant, not a failure to cooperate. Finally, although BOR did not secure the prompt delivery of

CONTRACTS--Continued

DISPUTES AND REMEDIES--Continued

Equitable Adjustments--Continued

electrical data from other contractors, appellant did not prove that this caused it extra, uncompensated, costs.

Appeal of Phoenix Control Systems, Inc., IBCA-2844
(Dec. 6, 1995) 102 I.D. 150

When the Government conceded that it was responsible for several days of delay and for some damage under appellant's contract to perform site grading and base preparation for fiberglass raceway tanks for fish, but appellant did not prove its damages with precision, the Board used a jury verdict approach in sustaining appellant's appeal in part, because (1) injury was acknowledged; (2) there was no more reliable method for computing damages; and (3) the evidence was sufficient to make a fair and reasonable approximation of damages.

Appeal of J&D Enterprises, Inc., IBCA 3506-95-E
(Dec. 8, 1995)

INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT

Generally

When legislation enacted during the pendency of an appeal alters the premise of a BIA decision concerning the service population under an Indian Self-Determination Act contract, the Board of Indian Appeals will remand the matter to the Bureau for issuance of a new decision taking the new law into account.

Douglas Indian Ass'n v. Juneau Area Director, Bureau of Indian Affairs, 27 IBIA 292 (Apr. 18, 1995)

DESERT LAND ENTRY

EXTENSION OF TIME

A decision rejecting an application for a second extension of time for the submission of final proof of a desert land entry will be set aside and the case remanded when the decision is based on the provisions of 43 U.S.C. § 333 (1988), rather than 43 U.S.C. § 334 (1988).

George L. Cramer, 134 IBLA 186 (Nov. 20, 1995)

ENVIRONMENTAL QUALITY

(See also Water Pollution Control)

GENERALLY

BLM may enforce a special stipulation in a coal lease, for the protection of a Federal reservoir, on surface lands which are privately owned.

Ark Land Co., 133 IBLA 31 (July 3, 1995)

ENVIRONMENTAL STATEMENTS

The requirement that in preparing an EIS an agency shall "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated," 40 CFR 1502.14(a), does not require an agency to discuss alternatives that would not satisfy the purposes of the proposed action or that are remote and speculative. In an EIS on a proposed right-of-way to construct a dam and reservoir, BLM's review of alternatives was reasonable, and its reasons for having eliminated from detailed study alternatives that could not be implemented in time

ENVIRONMENTAL QUALITY--Continued

ENVIRONMENTAL STATEMENTS--Continued

or about which there was insufficient information available were sufficient and were adequately discussed.

Allen D. Miller, 132 IBLA 270 (Apr. 24, 1995)

A challenge to a decision approving implementation of a native hardwood supplementation plan on the basis that the EA is inadequate will be denied when the appellant fails to highlight any deficiency in the assessment that would warrant overturning the decision.

Wilderness Watch, 132 IBLA 388 (June 13, 1995)

A rule of reason applies when reviewing new information regarding a proposed action analyzed in an EIS and considering whether a supplemental EIS is required. A decision to issue a right-of-way for a natural gas pipeline project analyzed in an EIS without preparation of a supplemental EIS will be affirmed when the information generated in a "second look" at the project does not significantly vary from that considered in the EIS in nature or magnitude of the disclosed impact.

Wyoming Independent Producers Ass'n, Independent Petroleum Ass'n of Mountain States, Wyoming Outdoor Council, National Trust for Historic Preservation, 133 IBLA 65 (July 13, 1995)

EQUAL ACCESS TO JUSTICE ACT

GENERALLY

A party who succeeds on any significant issue in the litigation which achieves some of the benefits sought may be eligible to recover fees under the EAJA.

An application for an award of attorney's fees to a prevailing party under the EAJA is properly denied if the position of the Government is substantially justified. That position must be substantially justified throughout the course of an adversary adjudication, and liability for attorney's fees may commence at any point where substantial justification ceases.

Only the most extraordinary special circumstances can support the conclusion that the position of the Government was substantially justified under the EAJA where its decision was found to be arbitrary, capricious, and an abuse of discretion.

Individuals whose net worth does not exceed the \$2,000,000 limit in 5 U.S.C. § 504(b) (1988), are eligible for an award of attorney's fees if the other requirements of the EAJA are met.

Bureau of Land Management v. Robert & Barbara Cosimati,
131 IBLA 390 (Jan. 18, 1995)

ADVERSARY ADJUDICATION

A hearing held pursuant to 43 U.S.C. § 315h (1988), in an appeal by the holder of a permit issued under 43 U.S.C. § 315b (1988), from the denial of a permanent increase in grazing privileges is an adversary adjudication under the EAJA, 5 U.S.C. § 504 (1988), and does not constitute an adjudication for the purpose of granting or renewing a license as defined in 5 U.S.C. § 504(b)(1)(C) (1988), and 43 CFR 4.602(b).

Bureau of Land Management v. Robert & Barbara Cosimati,
131 IBLA 390 (Jan. 18, 1995)

EQUAL ACCESS TO JUSTICE ACT--Continued

APPLICATION

The Board denied applicant's motion that material in support of its EAJA submission be placed under seal for lack of any demonstration of good cause to override the public's common law right of access to Board records.

The Board deferred ruling upon applicant's motion for oral argument, pending receipt of its modified application and BOR's response, and to encourage settlement negotiations.

EAJA Application of Hardrives, Inc., IBCA-3283-F
(Sept. 8, 1995) 102 I.D. 81

CONTRACT DISPUTES ACT OF 1978

Allowable Expenses

The Board denied in part BOR's supplemental motion to dismiss, finding that a court of appeals' determination that the Government had been substantially justified in bringing a fraud action against applicant, and its reversal of the district court's EAJA award, did not resolve whether BOR was substantially justified at all times in defending against applicant's contract claims, including after the district court had dismissed the fraud action. The doctrines of law of the case, res judicata, and collateral estoppel did not apply and the Board was not estopped by the appellate decision from making an EAJA award if applicant proved entitlement.

The Board deferred in part its decision on BOR's supplemental motion to dismiss, noting that, if BOR failed to prove substantial justification or special circumstances, and applicant otherwise satisfied EAJA criteria, then the Board would award such proportionate amount of allowable and uncompensated fees and costs pertaining to exhibits, testimony or other matters used in both the district court and Board proceedings as applicant established was fairly allocable to the Board

EQUAL ACCESS TO JUSTICE ACT--Continued

CONTRACT DISPUTES ACT OF 1978--Continued

Allowable Expenses--Continued

proceedings and would deny any portions of the application pertaining to charges incurred solely for the district court action.

EAJA Application of Hardrives, Inc., IBCA-3283-F
(Sept. 8, 1995) 102 I.D. 81

Application and Jurisdiction

The Board denied BOR's motion to dismiss as untimely an EAJA application for attorney fees and expenses. The Board held that counsel's declaration that BOR would not appeal the Board's decision sustaining various appeals, and BOR's payment of the amount due, did not render the decision final and unappealable. BOR was not precluded from changing course and, in the absence of a motion for reconsideration, not at issue, had 120 days from the latest date a party received its copy of the decision in which to appeal. The decision was not final until the time to appeal had expired. Applicant had 30 days from the date the decision became final in which to file its EAJA submission and it did so in a timely manner.

EAJA Application of Hardrives, Inc., IBCA-3283-F
(Sept. 8, 1995) 102 I.D. 81

EQUITABLE ADJUDICATION

SUBSTANTIAL COMPLIANCE

BLM properly denies a request to reinstate a headquarters site claim canceled for failure to submit an application to purchase the claim and required proof within 5 years of filing a notice of location of the claim, as required by 43 U.S.C. § 687a-1 (1982) and 43 CFR 2563.1-1(c), and declines to equitably adjudicate the claim under 43 U.S.C. §§ 1161, 1164 (1988) and 43 CFR 1871.1-1(a), where the evidence establishes only that, during the 5-year statutory life of the claim, the claimant erected a cabin on the land which he rented to one party for 6 months and to others for unspecified periods under unspecified terms. In these circumstances, the claimant did not show substantial compliance with the requirements of the headquarters site law by establishing that he used the land in connection with a productive industry, as required by sec. 10 of the Act of May 14, 1898, as amended, 43 U.S.C. § 687a (1982).

Thomas B. Craig, 134 IBLA 145 (Nov. 7, 1995)

ESTOPPEL

A claim of estoppel against the United States will be rejected where there is no showing of affirmative misconduct in the nature of an erroneous statement of fact in an official written decision or where the effect of allowing estoppel would be to grant a right not authorized by law.

United States v. Hiram B. Webb, 132 IBLA 152 (Mar. 17, 1995)

ESTOPPEL--Continued

The Board of Indian Appeals will not find estoppel against the BIA where the party advocating estoppel seeks payment from funds held in an IIM account.

Muscogee (Creek) Nation v. Muskogee Area Director, Bureau of Indian Affairs, 28 IBIA 24 (May 18, 1995)

Reliance on erroneous information given by a BLM employee or found in BLM records cannot create rights not authorized by law.

Golden Arc Mining & Refining Inc., 133 IBLA 90 (July 14, 1995)

Where a BIA regulation requires that a decision be issued within a certain time, the Board of Indian Appeals will not find the Bureau estopped by its delay in issuing a decision where the party seeking estoppel had a regulatory right to appeal from the Bureau's delay but failed to exercise that right.

Karen Spears v. Sacramento Area Director, Bureau of Indian Affairs, 28 IBIA 161 (Sept. 8, 1995)

EVIDENCE

GENERALLY

The Board has full authority to reverse findings of fact made by an ALJ. However, when the resolution of disputed facts is clearly premised upon a Judge's finding of credibility, which are in turn based upon the Judge's reaction to the demeanor of the witnesses, and such findings are supported by substantial evidence, they ordinarily will not be disturbed by the Board. The basis for this deference is the fact that the Judge who presides over a hearing has the opportunity to observe

EVIDENCE--Continued

GENERALLY--Continued

the witnesses and is in the best position to judge the weight to be given to conflicting testimony.

BLM v. William Carlo, Jr., 133 IBLA 206 (Aug. 1, 1995)

Where the Board of Land Appeals, based on the record before it, orders the issuance of a contest complaint, the record which was before the Board should be offered and admitted into evidence at any subsequent hearing unless otherwise expressly provided by the Board.

United States v. Angeline Galbraith, 134 IBLA 75
(Oct. 12, 1995) 102 I.D. 116

PREPONDERANCE

In a contest of a Native allotment claim, a claimant fails to overcome BLM's prima facie case of invalidity when the preponderance of the evidence demonstrates that the claimant never resided on the land, but instead used it about 10 days each year for a few hours for hunting, fishing, berrypicking, and gathering wood (never leaving any improvements or other physical signs of use), and that the land was used by other members of the local Native community without the claimant's express or implicit authorization. Under such circumstances, use and occupancy is both intermittent and not potentially exclusive of others.

United States v. Charles Pestrikoff, 134 IBLA 277
(Dec. 6, 1995)

EVIDENCE--Continued

PREPONDERANCE--Continued

A Native allotment application is properly denied where the preponderance of the evidence establishes that the applicant did not engage in qualifying use and occupancy as an independent citizen, but as a minor child in the company of and under the supervision of his parents and other family members, prior to withdrawal of the land from entry.

United States v. George Jim, Sr., 134 IBLA 294 (Dec. 12, 1995)

PRESUMPTIONS

Where contracts between an applicant or other party seeking to have an ownership or control link dissolved and an operator which has unabated violations of SMCRA and outstanding unpaid civil penalties contain provisions stating that the applicant owned rights to the coal to be mined and requiring the other party to deliver minimum quantities of coal, the requirements established under 30 CFR 773.5(b)(6) (1994) for a rebuttable presumption of ownership or control have been met. The question is whether the applicant rebutted the presumption by establishing by a preponderance of the evidence, as contained in the record as a whole, that it did not have "authority directly or indirectly to determine the manner in which" the operator conducted its surface mining operations under 30 CFR 773.5(b) (1994).

James Spur, Inc., et al. v. Office of Surface Mining & Enforcement, 133 IBLA 123 (July 26, 1995) 102 I.D. 43

EVIDENCE--Continued

PRESUMPTIONS--Continued

A rebuttable presumption exists that officers of the Government charged with receipt of applications duly and properly discharged their duties with respect to such applications. Where the records of the Department fail to disclose the receipt of an application, a party challenging this presumption bears the affirmative burden of establishing, by a preponderance of the evidence, that the application in question was duly filed.

BLM v. William Carlo, Jr., 133 IBLA 206 (Aug. 1, 1995)

A mining claimant who contends that land within a state school grant was encompassed by a mining claim and therefore unavailable for such conveyance bears the burden of overcoming a presumption that land granted to a state for school purposes was of the character contemplated by the grant and that title to the land consequently passed to the state. On a record that failed to establish the validity of the mining claim or the character of the land claimed, BLM properly declared the mining claim null and void ab initio.

Daniel O. Dismukes, 133 IBLA 335 (Sept. 6, 1995)

PRIMA FACIE CASE

Where the Government files a contest complaint against a Native allotment application, the Government bears the burden of presenting a prima facie case establishing that evidence of record does not affirmatively show compliance with all of the statutory and regulatory requirements necessary to obtain title to a Native allotment under the Native Allotment Act of 1906.

United States v. Angeline Galbraith, 134 IBLA 75
(Oct. 12, 1995) 102 I.D. 116

EVIDENCE--Continued

PRIMA FACIE CASE--Continued

In a contest of a Native allotment claim, BLM establishes a prima facie case that the claimant failed to satisfy the use and occupancy requirements of the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), when it presents evidence that, on the basis of an on-the-ground examination of the parcels with the claimant present, it has been unable to confirm any qualifying use and occupancy due to the lack of any physical evidence of such activity.

United States v. Charles Pestrikoff, 134 IBLA 277 (Dec. 6, 1995)

SUFFICIENCY

The Board has full authority to reverse findings of fact made by an ALJ. However, when the resolution of disputed facts is clearly premised upon a Judge's finding of credibility, which are in turn based upon the Judge's reaction to the demeanor of the witnesses, and such findings are supported by substantial evidence, they ordinarily will not be disturbed by the Board. The basis for this deference is the fact that the Judge who presides over a hearing has the opportunity to observe the witnesses and is in the best position to judge the weight to be given to conflicting testimony.

BLM v. William Carlo, Jr., 133 IBLA 206 (Aug. 1, 1995)

WEIGHT

The Board has full authority to reverse findings of fact made by an ALJ. However, when the resolution of disputed facts is clearly premised upon a Judge's finding of credibility, which are in turn based upon the Judge's reaction to the demeanor of the witnesses, and such findings are supported by substantial evidence, they

EVIDENCE--Continued

WEIGHT--Continued

ordinarily will not be disturbed by the Board. The basis for this deference is the fact that the Judge who presides over a hearing has the opportunity to observe the witnesses and is in the best position to judge the weight to be given to conflicting testimony.

BLM v. William Carlo, Jr., 133 IBLA 206 (Aug. 1, 1995)

EXCHANGES OF LAND

(See also Indians, Private Exchanges, State Exchanges, Wildlife Refuges & Projects)

GENERALLY

Sec. 206(a) of FLPMA, 43 U.S.C. § 1716(a) (1988), authorizes the Secretary of the Interior to exchange public lands, or an interest therein, if the public interest will be well served by such exchange. A protest against an exchange is properly dismissed where the record shows that BLM fully considered in an EA and an addendum thereto the impact of the exchange of certain of the public lands on the grazing operation of the protestant, who held a grazing lease for such lands, and determined that any detrimental effect on the protestant operation was outweighed by the public interest in completing the exchange.

Jesse B. Knopp, 133 IBLA 263 (Aug. 3, 1995)

FEDERAL EMPLOYEES AND OFFICERS

(See also Administrative Authority, Claims Against the United States, Officers & Employees)

GENERALLY

To the extent that cadastral surveyors employed by BLM conduct a dependent resurvey of the public lands of the United States, pursuant to 43 U.S.C. § 772 (1988), to mark the boundaries of undisposed lands, a state licensing authority may not impose its requirements on such employees when they are engaged within the scope of their official duties.

Thom Seal et al., 132 IBLA 244 (Apr. 17, 1995)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976

(See also Hearings, Rights-of-Way)

ASSESSMENT WORK

Compliance with sec. 314(a) of FLPMA, 43 U.S.C. § 1744(a) (1988), is accomplished by the annual filing of a copy of either proof of assessment work performed or a notice of intention to hold the mining claim. Compliance with the requirements of the assessment statute, 30 U.S.C. § 28 (1988), is accomplished only by the actual performance of the assessment work or by obtaining a deferment of the assessment work. Compliance with one of the foregoing statutes does not constitute compliance with the other.

United States v. Hiram B. Webb, 132 IBLA 152 (Mar. 17, 1995)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

GRAZING LEASES AND PERMITS

The definition of "affected interest" at 43 CFR 4100.0-5 has two parts. The first is the requirement that an individual express concern for management of a particular allotment in writing. The second is the provision for discretionary determination by the authorized officer that the individual should be granted affected interest status. To the extent a party's use of land within an allotment has been and will be affected by BLM's management of grazing, there is a factual basis for designating the party an affected interest. A written request for designation as an affected interest which states that the party uses an allotment and expresses concern about the management of livestock grazing provides a factual basis supporting a decision granting the designation and precludes it from being arbitrary and capricious.

Bear River Land & Grazing, et al. v. The Bureau of Land Management, 132 IBLA 110 (Feb. 28, 1995)

LAND-USE PLANNING

The Board has no jurisdiction over appeals from the approval or amendment of an RMP, but only over actions implementing such a plan. 43 CFR 1610.5-2; 43 CFR 1610.5-3. A "Planning Update" distributed by a BLM resource area manager which was relative to the resource management planning process and was preliminary to issuance of a final RMP is not subject to administrative review by the Board of Land Appeals because actions described therein are not actions implementing an RMP or some portion thereof. 43 CFR 1610.5-3(b).

Southern Utah Wilderness Alliance, American Rivers, 132 IBLA 255 (Apr. 19, 1995)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

LAND-USE PLANNING--Continued

BLM's failure to seek designation of an area as a historical landscape does not, by itself, constitute an "identifiable decision" subject to appeal under 43 CFR 4.410. To the extent that designation of an historical landscape would require its proposal as an area of critical environmental concern, the proposal must be made through BLM's land-use planning process. The Board does not have jurisdiction to consider appeals from the approval or amendment of a RMP and cannot gain jurisdiction until action is taken to implement the plan.

When a BLM RMP provides that major utility and transportation systems will be located to make use of existing corridors whenever possible but also provides that most of the area (excepting specified avoidance areas) will be open for location of major utility systems, a decision approving a right-of-way for a buried natural gas pipeline will not be reversed as inconsistent with the land use plan if the right-of-way does not cross an avoidance area, and BLM reasonably concludes that a longer alternative route paralleling existing rights-of-way would not be appropriate because of the added cost and disturbance.

Wyoming Independent Producers Ass'n, Independent Petroleum Ass'n of Mountain States, Wyoming Outdoor Council, National Trust for Historic Preservation,
133 IBLA 65 (July 13, 1995)

Although the Board of Land Appeals has no jurisdiction to review appeals of decisions to approve or amend a RMP, approval of an activity plan designed to implement a RMP is appealable to the Board.

Petroleum Ass'n of Wyoming, et al., 133 IBLA 337
(Sept. 7, 1995)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

LAND-USE PLANNING--Continued

A request for stay is denied and the underlying appeal is dismissed because an association seeking to appeal a BLM decision to burn woodlands was not a "party to a case" under 43 CFR 4.410(a) and therefore lacked standing to appeal after officers of the association declined to participate in BLM planning prior to issuance of a decision although invited to do so.

Committee for Idaho's High Desert, 133 IBLA 378
(Sept. 19, 1995)

BLM may properly decline to approve an application for the small-scale mining and removal of mineral materials from public lands designated part of a desert bighorn sheep management area where BLM is in the process of defining permissible human activity within the area pursuant to its land-use planning authority under sec. 202 of FLPMA.

Jenott Mining Corp., 134 IBLA 191 (Nov. 21, 1995)

PERMITS

An application for issuance of a commercial recreation permit to an outfitter offering hiking trips assisted by pack llamas into the public lands was denied in error when BLM found that publication of a magazine article describing such a trip without prior review by BLM was a breach of the terms of a prior permit.

Curt Farmer Pack Llamas, 132 IBLA 42 (Feb. 10, 1995)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

PERMITS--Continued

A special recreation permit holder is subject to any permit condition or stipulation BLM deems necessary to protect the public interest, and where a commercial river rafting permit holder is on notice that violation of party size restrictions may result in sanctions, BLM may invoke such sanctions upon noncompliance.

A decision issuing a special recreation permit for commercial river rafting on a probationary basis based on party size violations during the previous commercial rafting season will be affirmed on appeal where the case record establishes that the permittee violated the party size restriction on four occasions during that previous season.

Carrol White, 132 IBLA 141 (Mar. 16, 1995)

An appraisal of fair market value for a land-use permit issued pursuant to sec. 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1988), will be affirmed unless an appellant either demonstrates error in the appraisal method or presents convincing evidence that the charge is excessive.

C Bar C Ranch Partnership, 132 IBLA 261 (Apr. 21, 1995)

BLM properly denies an application for a special recreation use permit for an organized off-road motorcycle race where the record establishes that it would widen an existing trail in a WSA and thereby impair its suitability for designation as wilderness, as such use is forbidden by sec. 603(c) of FLPMA.

Lassen Motorcycle Club, 133 IBLA 104 (July 20, 1995)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

PERMITS--Continued

Although directed by Curt Farmer Pack Llamas, 132 IBLA 42 (1995), to renew a commercial recreation permit, BLM refused to do so; no justification for this failure to comply with the cited decision having been provided, BLM is directed forthwith to issue a permit to Farmer for a reasonable term consistent with the use sought to be permitted.

Curt Farmer Pack Llamas, 133 IBLA 278 (Aug. 9, 1995)

An application for a land-use permit to allow a survey of Federal land sought to be acquired for use as a land-fill and co-generation plant was properly rejected because the ultimate use proposed was not consistent with the Arizona Strip RMP.

Perfect Ten Industries, 134 IBLA 118 (Nov. 1, 1995)

PUBLIC PARTICIPATION

The definition of "affected interest" at 43 CFR 4100.0-5 has two parts. The first is the requirement that an individual express concern for management of a particular allotment in writing. The second is the provision for discretionary determination by the authorized officer that the individual should be granted affected interest status. To the extent a party's use of land within an allotment has been and will be affected by BLM's management of grazing, there is a factual basis for designating the party an affected interest. A written request for designation as an affected interest which states that the party uses an allotment and expresses concern about the management of livestock grazing provides a factual basis supporting a

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

PUBLIC PARTICIPATION--Continued

decision granting the designation and precludes it from being arbitrary and capricious.

Bear River Land & Grazing, et al. v. The Bureau of Land Management, 132 IBLA 110 (Feb. 28, 1995)

RECORDATION OF MINING CLAIMS AND ABANDONMENT

Rights acquired under a relocation of a mining claim determined to be abandoned and void pursuant to 43 U.S.C. § 1744 (1988), do not relate back to the date of the location of the original claim but only to the date of relocation.

Wayne J. Brewer, 132 IBLA 220 (Apr. 11, 1995)

RECORDATION OF MINING CLAIM CERTIFICATES OR NOTICES OF LOCATION

While the provisions of 30 U.S.C. § 38 (1988), permit an individual who has held and worked a claim, as provided therein, to assert a location without the necessity of proving local recording and posting, such a claim must still be timely recorded with BLM in accordance with the recordation provisions of sec. 14 of FLPMA, 43 U.S.C. § 1744 (1988), and where the claim has not been duly recorded, it is a nullity. Where placer rights are alleged under 30 U.S.C. § 38 (1988), such rights must be based on an asserted placer location. Placer rights do not, through the working of this statute, ever attach to a lode location.

United States v. Hiram B. Webb, 132 IBLA 152 (Mar. 17, 1995)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY

Generally, the proper appraisal method for determining the fair market rental value of nonlinear rights-of-way, including communication sites, is the comparable lease method of appraisal. An appraisal of fair market rental value for a communication site right-of-way will be affirmed on appeal if an appellant fails to show error in the appraisal methods used or fails to show by a preponderance of the evidence that the charges are in excess of the fair market rental value.

Where an appraisal is undertaken for the purpose of determining the initial rental for a communication site right-of-way which has already issued, the fair market value must be calculated as of the date of the issuance of the right-of-way and not as of the date of the appraisal.

Oroville-Wyandotte Irrigation District, 131 IBLA 379
(Jan. 9, 1995)

An application for communications site right-of-way is properly rejected as not in the public interest where BLM determines that an existing Federal right-of-way provides adequate capacity for the applicant's radio transmitting and receiving equipment, and that granting the application would result in unnecessary proliferation of communications equipment and resulting adverse impact on visual resources. BLM is not required to issue another right-of-way to foster economic competition or to permit the applicant to avoid rents charged by the current right-of-way holder.

SMR Network, Inc., 131 IBLA 384 (Jan. 9, 1995)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

Use of a road on O&C for hauling logs before a permit is issued is a willful trespass under 43 CFR 2800.0-5(v).

Larry Brown & Associates, 132 IBLA 14 (Jan. 19, 1995)

BLM properly requires the holder of a communication site right-of-way to pay rental charges, in addition to those originally estimated at the time of issuance of the right-of-way grant, based upon an appraisal of the fair market rental value of the right-of-way grant. A delay of over 2 years between issuance of the right-of-way grant and notification to the holder of the appraised rental value does not relieve the right-of-way holder of the obligation to pay the appraised rental charges.

Generally, the proper appraisal method for determining the fair market rental value of nonlinear rights-of-way, including communication sites, is the comparable lease method of appraisal. An appraisal of a right-of-way grant will not be set aside unless BLM has erred in applying the proper criteria to calculate the fair market rental value or the appellant demonstrates that the resulting charges are excessive. Absent a showing of error in the appraisal methods utilized, an appellant is normally required to submit another appraisal in order to present sufficiently convincing evidence that the rental charges are excessive.

Michael D. Dahmer, 132 IBLA 17 (Jan. 23, 1995)

The requirement that in preparing an EIS an agency shall "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated," 40 CFR 1502.14(a), does not require an agency to discuss alternatives that would not satisfy the purposes of the proposed action or that are remote and speculative. In an

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

EIS on a proposed right-of-way to construct a dam and reservoir, BLM's review of alternatives was reasonable, and its reasons for having eliminated from detailed study alternatives that could not be implemented in time or about which there was insufficient information available were sufficient and were adequately discussed.

When considering applications for rights-of-way privileges, the DOI has no power to determine questions of control and appropriation of water rights as between private parties, as such questions are exclusively matters of state law.

A BLM decision exercising the Secretary's discretion to grant a right-of-way will be affirmed on appeal where the record demonstrates that it was based upon a reasoned analysis of all relevant factors, was made with due regard for the public interest, and sufficient reasons for disturbing the decision are not shown.

Allen D. Miller, 132 IBLA 270 (Apr. 24, 1995)

BLM properly establishes the fair market rental value of a road access right-of-way by utilizing the regulatory rental fee schedule for linear rights-of-way found at 43 CFR 2803.1-2(c), during the course of a periodic adjustment necessary to reflect the current fair market value. Where an appellant fails to point out error in BLM's determination, the rental assessment will be affirmed.

Willard Herzberg, 132 IBLA 384 (June 6, 1995)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

When a BLM RMP provides that major utility and transportation systems will be located to make use of existing corridors whenever possible but also provides that most of the area (excepting specified avoidance areas) will be open for location of major utility systems, a decision approving a right-of-way for a buried natural gas pipeline will not be reversed as inconsistent with the land use plan if the right-of-way does not cross an avoidance area, and BLM reasonably concludes that a longer alternative route paralleling existing rights-of-way would not be appropriate because of the added cost and disturbance.

Wyoming Independent Producers Ass'n, Independent Petroleum Ass'n of Mountain States, Wyoming Outdoor Council, National Trust for Historic Preservation,
133 IBLA 65 (July 13, 1995)

FLPMA grants the Secretary of the Interior discretionary authority to issue rights-of-way. A BLM decision granting a reciprocal grant right-of-way application filed pursuant to sec. 501(a) of FLPMA, 43 U.S.C. § 1761(a) (1988), will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made with due regard for the public interest, and no reason for disturbing the decision is shown on appeal.

John M. Stout, 133 IBLA 321 (Aug. 22, 1995)

A BLM decision rejecting a right-of-way application for a water-gathering and pipeline project, filed pursuant to sec. 501 of FLPMA, 43 U.S.C. § 1761 (1988), will be affirmed where the record shows the decision to be a reasoned analysis of the facts involved, made with due regard for the public interest.

The burden is on a right-of-way applicant, who challenges a BLM decision denying its application, to demonstrate by a preponderance of the evidence that BLM

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

erred in the collection or evaluation of data supporting rejection and in its conclusions. The applicant's reliance on a BLM engineering report, which concluded that a water-gathering and pipeline project was marginally feasible, does not establish error in the denial, when the denial decision was based not only on the engineering report, but on an environmental analysis prepared by BLM experts, showing that granting the application would adversely affect public land values, including grazing activities, wetlands, and wildlife and its habitat.

Stewart Hayduk, 133 IBLA 346 (Sept. 13, 1995)

In order to expedite issuance of rights-of-way, the regulations authorize BLM to estimate rental and collect an advance deposit subject to adjustment upon completion of an appraisal of the fair market rental value. When the estimated rental is charged on a calendar year basis, the annual estimated rental is properly prorated on a monthly basis for the first (partial) year of the right-of-way.

An appeal of the rental charge for a communications site right-of-way based on a preliminary rental estimate by BLM under 43 CFR 2803.1-2(c)(3)(ii) is premature prior to an appraisal of the fair market rental value and is therefore properly dismissed.

Pinnacles Telephone Co., 134 IBLA 53 (Oct. 4, 1995)

In approving an application for the assignment of a right-of-way issued under the FLPMA, 43 U.S.C. §§ 1761-1771 (1988), BLM may add a condition requiring that a pipeline constructed on the right-of-way be operated as a common carrier.

In approving an application for the assignment of a right-of-way issued under the FLPMA, 43 U.S.C.

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

RIGHTS-OF-WAY--Continued

§§ 1761-1771 (1988), it is beyond BLM's authority to add provisions regarding rates to be charged for use of a pipeline that has been held to be a common carrier because that is a matter that has been delegated to the Interstate Commerce Commission.

Ashley Creek Phosphate Co., John D. Archer, 134 IBLA
206 (Nov. 29, 1995) 102 I.D. 133

SURFACE MANAGEMENT

BLM properly issues a notice of noncompliance under 43 CFR 3809.3-2 and requires removal of personal property from a mining claim and reclamation of the claim to a condition that existed prior to surface-disturbing activities when a mining claimant constructs a road before filing a notice under 43 CFR 3809.1-3 and causes unnecessary and undue degradation.

Douglas Ditto, 132 IBLA 359 (May 17, 1995)

WILDERNESS

BLM properly denies an application for a special recreation use permit for an organized off-road motorcycle race where the record establishes that it would widen an existing trail in a WSA and thereby impair its suitability for designation as wilderness, as such use is forbidden by sec. 603(c) of FLPMA.

Lassen Motorcycle Club, 133 IBLA 104 (July 20, 1995)

FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982

ROYALTIES

MMS had statutory and regulatory authority to require production of documents concerning crude oil sales contracts made by an affiliate of a Federal oil and gas lessee that were needed to ensure there had been compliance with the gross proceeds rule established by Departmental regulation 30 CFR 206.102(h) (1989).

Shell Oil Co. (On Reconsideration), 132 IBLA 354
(May 11, 1995)

The regulated ceiling price for natural gas produced from an OCS lease is one of the factors to be considered in valuing the gas for royalty purposes. Gas may be valued at the applicable ceiling price regardless of the fact it was sold at a lesser price where there was no reasonable basis for the lessee to believe the gas did not qualify for that regulated price.

In the absence of a successful production test, gas produced from a reservoir penetrated by a well drilled before July 27, 1976, did not qualify for the higher natural gas ceiling price under sec. 102(d) of the Natural Gas Policy Act when evidence of production capability meeting the requirements of OCS Order No. 4 demonstrated that the reservoir was capable of production in paying quantities or when certain evidence (including sidewall cores and core analysis) indicated the reservoir was commercially producible.

A finding of a reservoir capable of production in paying quantities under sec. 102(d)(2)(B)(ii) of the Natural Gas Policy Act requires evidence of production capability meeting the requirements of OCS Order No. 4. A sidewall core analysis showing a certain stratum to be productive of gas did not establish a reservoir capable of production in paying quantities under OCS Order No. 4 when a contemporaneous electric log for the well showed less than 15 feet of producible sand.

In a case in which the evidence of record establishes that a producing reservoir penetrated by a well

FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982

--Continued

ROYALTIES--Continued

prior to July 1976 was reasonably believed by the operator to be commercially producible under sec. 102(d)(2)(B)(iii) of the Natural Gas Policy Act on the basis of side wall cores and core analysis showing the reservoir to be productive of gas, a finding that the reservoir was not discovered before July 1976 based on an induction-electric well log which did not show a minimum of 15 feet of producible sand in one section will be reversed in the absence of a regulation promulgating this requirement under the language of sec. 102(d)(2)(b)(iii).

Mobil Oil Corp. v. Minerals Management Service, 133 IBLA 300 (Aug. 15, 1995)

A Federal oil and gas lessee's duty to put gas produced from the lease into a marketable condition includes sweetening sour gas by removing hydrogen sulfide, and the costs of such treatment are not deductible from the value of the production for royalty computation purposes no matter who performs the treatment or whether title to the gas passes before the sweetening occurs. Where a contract for the purchase of natural gas produced from Federal leases provides that when sour gas is delivered the price paid will be equal to the price for sweet gas minus a fee for sweetening the sour gas, MMS properly disallows a deduction for the costs of sweetening the gas and values the gas production for royalty purposes at the price for sweet gas.

A MMS demand for additional royalty on production from Federal onshore oil and gas leases is an administrative action not covered by 28 U.S.C. § 2415(a) (1988), which establishes a 6-year time limitation for the commencement of judicial actions for damages by the United States.

Texaco Inc., 134 IBLA 109 (Oct. 12, 1995)

FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982

--Continued

ROYALTIES--Continued

In the absence of a market for gas at the wellhead where production would ordinarily be sold and valued, the Department may authorize the deduction of a transportation allowance from the market value of the gas to reflect the costs incurred in transporting the gas from the leasehold to the first available market.

Absent a determination either that crucial facts were not disclosed or that express regulatory provisions were violated, an order of the U.S. Geological Survey authorizing a transportation allowance is not subject to retroactive reversal.

No deduction for royalty valuation purposes is allowed for transportation costs incurred in moving production from the wellhead to a selling point within that lease nor are the costs of transporting lease production beyond the point of the nearest potential market deductible from value for royalty purposes.

In order for a lessee to be entitled to deduct off-lease transportation costs for royalty purposes, a lessee must request, and the appropriate Departmental officer must approve, a transportation allowance.

Viersen & Cochran, 134 IBLA 155 (Nov. 9, 1995)

Under the "gross proceeds" rule the value of production for royalty purposes shall never be less than the gross proceeds accruing to the lessee from the sale thereof. The sale price received by an affiliate of the lessee in the first arm's-length transaction is properly considered in determining the value of produced gas under the gross proceeds rule.

FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982
--Continued

ROYALTIES--Continued

Under the "marketable condition" rule royalty is due on the gross proceeds accruing to the lessee including payments for the cost of measuring, gathering, and compressing gas where such services are necessary to place the gas in marketable condition. Deductions from the value of the gas for these expenses are not allowed whether incurred by the lessee or a third party, before or after the initial sale of the gas, when the evidence discloses this is necessary to market the gas.

When gas is valued at a point downstream from the wellhead where the value of production is ordinarily determined, allowances are generally required for expenses (other than those required to put the gas in marketable condition) which add to the value of the gas after production. Valuation of gas properly considers the price received in the first arm's-length sale, but an assessment based on such a valuation will be vacated and remanded when the record shows that it failed to consider transportation costs reflected in the sale price.

Xeno, Inc., 134 IBLA 172 (Nov. 14, 1995)

MMS properly required the lessee of a Federal Indian allottee oil and gas lease to review royalty accounts and to compute and pay additional royalties where an MMS audit demonstrated a systemic underpayment of royalties in 4 of 6 test months.

The 6-year statute of limitations at 28 U.S.C. § 2415(a) (1988), for commencement by the United States of civil actions for damages, does not apply to limit administrative action by the Department. An MMS order requiring recalculation and payment of additional royalties on an Indian allottee oil and gas

FEDERAL OIL AND GAS ROYALTY MANAGEMENT ACT OF 1982

--Continued

ROYALTIES--Continued

lease is an administrative action that is not covered by that statute of limitations.

Texaco Exploration and Production, Inc., 134 IBLA 267 (Dec. 1, 1995)

FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT

(See also Surplus Property)

The proviso in 40 U.S.C. § 483(a)(2) (1994), concerning the transfer of excess Federal real property to Oklahoma Indian tribes, applies only to property within the State of Oklahoma.

The main part of 40 U.S.C. § 483(a)(2) (1994), concerning the transfer of excess Federal real property to Indian tribes, applies to such property located within a current Indian reservation.

Wyandotte Tribe of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs, 28 IBIA 247 (Oct. 25, 1995)

GEOTHERMAL LEASES

(See also Hearings, Mineral Leasing Act)

APPLICATIONS

Description

Sec. 12 of the Geothermal Steam Act of 1970 requires that cancellation of a lease issued under the Act must be preceded by 30-days NOV to permit the lessee to commence in good faith to cure the violation giving rise to cancellation. In a case where the required

GEOTHERMAL LEASES--Continued

APPLICATIONS--Continued

Description--Continued

notice was not given, corrective action will be taken to provide the lessee the protection provided by the Act.

Earth Power Energy & Minerals, Inc., 132 IBLA 8
(Jan. 19, 1995)

CANCELLATION

Sec. 12 of the Geothermal Steam Act of 1970 requires that cancellation of a lease issued under the Act must be preceded by 30-days NOV to permit the lessee to commence in good faith to cure the violation giving rise to cancellation. In a case where the required notice was not given, corrective action will be taken to provide the lessee the protection provided by the Act.

Earth Power Energy & Minerals, Inc., 132 IBLA 8
(Jan. 19, 1995)

DESCRIPTION OF LAND

Sec. 12 of the Geothermal Steam Act of 1970 requires that cancellation of a lease issued under the Act must be preceded by 30-days NOV to permit the lessee to commence in good faith to cure the violation giving rise to cancellation. In a case where the required notice was not given, corrective action will be taken to provide the lessee the protection provided by the Act.

Earth Power Energy & Minerals, Inc., 132 IBLA 8
(Jan. 19, 1995)

GEOTHERMAL LEASES--Continued

NONCOMPETITIVE LEASES

Sec. 12 of the Geothermal Steam Act of 1970 requires that cancellation of a lease issued under the Act must be preceded by 30-days NOV to permit the lessee to commence in good faith to cure the violation giving rise to cancellation. In a case where the required notice was not given, corrective action will be taken to provide the lessee the protection provided by the Act.

Earth Power Energy & Minerals, Inc., 132 IBLA 8
(Jan. 19, 1995)

GOVERNMENT PROPERTY

The proviso in 40 U.S.C. § 483(a)(2) (1994), concerning the transfer of excess Federal real property to Oklahoma Indian tribes, applies only to property within the State of Oklahoma.

The main part of 40 U.S.C. § 483(a)(2) (1994), concerning the transfer of excess Federal real property to Indian tribes, applies to such property located within a current Indian reservation.

Wyandotte Tribe of Oklahoma v. Muskogee Area Director,
Bureau of Indian Affairs, 28 IBIA 247 (Oct. 25, 1995)

GRAZING AND GRAZING LANDS

Under 43 CFR 4.477, the ALJ may either place his or her decision into full force and effect or revoke the

GRAZING AND GRAZING LANDS--Continued

full force and effect of a BLM decision only in the context of issuing a final decision on the merits of the pending appeal.

Filippini Ranching Co. & Paris Ranch v. Bureau of Land Management, 133 IBLA 19 (June 30, 1995)

The 1978 amendments to the grazing regulations effected such substantial changes in what was formerly known as the Federal Range Code that the precedential value of Departmental adjudications rendered prior to these amendments has been significantly reduced, particularly with respect to the issuance and administration of grazing permits under sec. 3 of the Taylor Grazing Act, 43 U.S.C. § 315b (1988).

Delmer & Jo McLean v. Bureau of Land Management, 133 IBLA 225 (Aug. 3, 1995)

GRAZING PERMITS AND LICENSES

(See also Appeals, Hearings, Taylor Grazing Act)

GENERALLY

The definition of "affected interest" at 43 CFR 4100.0-5 has two parts. The first is the requirement that an individual express concern for management of a particular allotment in writing. The second is the provision for discretionary determination by the authorized officer that the individual should be granted affected interest status. To the extent a party's use of land within an allotment has been and will be affected by BLM's management of grazing, there is a factual basis for designating the party an affected interest. A written request for designation as an affected interest which states that the party uses an allotment and expresses concern about the management of livestock grazing provides a factual basis supporting a

GRAZING PERMITS AND LICENSES--Continued

GENERALLY--Continued

decision granting the designation and precludes it from being arbitrary and capricious.

Bear River Land & Grazing, et al. v. The Bureau of Land Management, 132 IBLA 110 (Feb. 28, 1995)

With respect to the allocation in an allotment of additional forage available on a sustained yield basis, the applicable regulation, 43 CFR 4110.3-1, first requires that the additional forage be used to satisfy existing grazing preferences of those authorized to graze within the allotment and then authorizes the allocation of the remaining forage either in recognition of the contribution and efforts of individual permittees in increasing forage production or to permittees in the proportion of their authorized use within the allotment or to other qualified applicants.

While the Department will normally respect and give effect to range-line and allotment agreements, the Department always retains the authority to override such agreements where they are found to be incompatible with the proper administration of the Federal range.

In determining the extent to which a grazing permittee's contributions and efforts have contributed to an increase in available forage within an allotment, all expenditures which have benefitted forage production, including those made by BLM, are properly considered. A permittee has no right to receive more than a proportionate share of the forage increase as determined by comparing the permittee's contributions to the total contributions made.

Delmer & Jo McLean v. Bureau of Land Management, 133 IBLA 225 (Aug. 3, 1995)

GRAZING PERMITS AND LICENSES--Continued

GENERALLY--Continued

An ALJ's determination that a BLM ear-tagging decision was arbitrary and capricious will be affirmed where the record does not demonstrate that, under the extant circumstances, ear-tagging would promote proper management of the public range.

James D. Wilcox v. Bureau of Land Management, 134 IBLA 57 (Oct. 5, 1995)

ADJUDICATION

A hearing held pursuant to 43 U.S.C. § 315h (1988), in an appeal by the holder of a permit issued under 43 U.S.C. § 315b (1988), from the denial of a permanent increase in grazing privileges is an adversary adjudication under the EAJA, 5 U.S.C. § 504 (1988), and does not constitute an adjudication for the purpose of granting or renewing a license as defined in 5 U.S.C. § 504(b)(1)(C) (1988), and 43 CFR 4.602(b).

Bureau of Land Management v. Robert & Barbara Cosimati, 131 IBLA 390 (Jan. 18, 1995)

The 1978 amendments to the grazing regulations effected such substantial changes in what was formerly known as the Federal Range Code that the precedential value of Departmental adjudications rendered prior to these amendments has been significantly reduced, particularly with respect to the issuance and administration of grazing permits under sec. 3 of the Taylor Grazing Act, 43 U.S.C. § 315b (1988).

Delmer & Jo McLean v. Bureau of Land Management, 133 IBLA 225 (Aug. 3, 1995)

GRAZING PERMITS AND LICENSES--Continued

ADJUDICATION--Continued

An ALJ's determination that a BLM ear-tagging decision was arbitrary and capricious will be affirmed where the record does not demonstrate that, under the extant circumstances, ear-tagging would promote proper management of the public range.

James D. Wilcox v. Bureau of Land Management, 134 IBLA 57 (Oct. 5, 1995)

ADMINISTRATIVE LAW JUDGE

An ALJ's determination that a BLM ear-tagging decision was arbitrary and capricious will be affirmed where the record does not demonstrate that, under the extant circumstances, ear-tagging would promote proper management of the public range.

James D. Wilcox v. Bureau of Land Management, 134 IBLA 57 (Oct. 5, 1995)

APPEALS

Under 43 CFR 4.477, the ALJ may either place his or her decision into full force and effect or revoke the full force and effect of a BLM decision only in the context of issuing a final decision on the merits of the pending appeal.

Filippini Ranching Co. & Paris Ranch v. Bureau of Land Management, 133 IBLA 19 (June 30, 1995)

GRAZING PERMITS AND LICENSES--Continued

APPEALS--Continued

The 1978 amendments to the grazing regulations effected such substantial changes in what was formerly known as the Federal Range Code that the precedential value of Departmental adjudications rendered prior to these amendments has been significantly reduced, particularly with respect to the issuance and administration of grazing permits under sec. 3 of the Taylor Grazing Act, 43 U.S.C. § 315b (1988).

Delmer & Jo McLean v. Bureau of Land Management, 133 IBLA 225 (Aug. 3, 1995)

An ALJ's determination that a BLM ear-tagging decision was arbitrary and capricious will be affirmed where the record does not demonstrate that, under the extant circumstances, ear-tagging would promote proper management of the public range.

James D. Wilcox v. Bureau of Land Management, 134 IBLA 57 (Oct. 5, 1995)

APPORTIONMENT OF FEDERAL RANGE

With respect to the allocation in an allotment of additional forage available on a sustained yield basis, the applicable regulation, 43 CFR 4110.3-1, first requires that the additional forage be used to satisfy existing grazing preferences of those authorized to graze within the allotment and then authorizes the allocation of the remaining forage either in recognition of the contribution and efforts of individual permittees in increasing forage production or to permittees in the proportion of their authorized use within the allotment or to other qualified applicants.

While the Department will normally respect and give effect to range-line and allotment agreements, the Department always retains the authority to override such

GRAZING PERMITS AND LICENSES--Continued

APPORTIONMENT OF FEDERAL RANGE--Continued

agreements where they are found to be incompatible with the proper administration of the Federal range.

In determining the extent to which a grazing permittee's contributions and efforts have contributed to an increase in available forage within an allotment, all expenditures which have benefitted forage production, including those made by BLM, are properly considered. A permittee has no right to receive more than a proportionate share of the forage increase as determined by comparing the permittee's contributions to the total contributions made.

Delmer & Jo McLean v. Bureau of Land Management,
133 IBLA 225 (Aug. 3, 1995)

HEARINGS

(See also Administrative Procedure, Federal Land Policy & Management Act of 1976, Geothermal Leases, Grazing Permits & Licenses, Indian Probate, Mining Claims, Multiple Mineral Development Act, Rules of Practice, Surface Mining Control & Reclamation Act of 1977, Surface Resources Act, Water Pollution Control)

Where the Board of Land Appeals, based on the record before it, orders the issuance of a contest complaint, the record which was before the Board should be offered and admitted into evidence at any subsequent hearing unless otherwise expressly provided by the Board.

The voluntary decision of a contestee not to proceed but rather to challenge a ruling by an ALJ that a prima facie case has been presented at a hearing constitutes a waiver of the contestee's right

HEARINGS--Continued

to present evidence on his or her own behalf. Should the appeal of the ruling be unsuccessful, the contestee will not ordinarily be afforded an additional hearing.

Where, at the close of the Government's case-in-chief, a contestee moves for dismissal of the complaint on the ground that a prima facie showing has not been made, it is error for an ALJ to take the motion under advisement and direct the contestee to proceed with its presentation.

United States v. Angeline Galbraith, 134 IBLA 75
(Oct. 12, 1995) 102 I.D. 116

INDIAN PROBATE

(See also Appeals, Bureau of Indian Affairs, Hearings, Indians, Rules of Practice)

ADMINISTRATIVE LAW JUDGE

Generally

If the ALJ deciding a case is not the Judge who held the hearing, the Board of Indian Appeals will review witness credibility determinations de novo.

Estate of Emerson Eckiwaudah, 27 IBIA 245 (Mar. 29, 1995)

APPEALS (See also PLEADING, RECONSIDERATION)

Generally

If the ALJ deciding a case is not the Judge who

INDIAN PROBATE--Continued

APPEALS (See also PLEADING, RECONSIDERATION)--Continued

Generally--Continued

held the hearing, the Board of Indian Appeals will review witness credibility determinations de novo.

Estate of Emerson Eckiwaudah, 27 IBIA 245 (Mar. 29, 1995)

ATTORNEYS AT LAW

Fees

Under 43 CFR 4.281, a petition for award of attorney fees is required to be filed prior to the close of the last hearing.

Estate of Helen Fisher Parker, 27 IBIA 271 (Apr. 5, 1995)

CHILDREN, ILLEGITIMATE (See also INHERITING)

Generally

Paternity in an Indian probate case is a question of Federal, not state, law. State law evidentiary standards for determining paternity do not apply in Indian probate proceedings.

The standard of proof of paternity in Indian probate cases is preponderance of the evidence.

Absent strong extenuating circumstances, the mother's testimony at the probate hearing is not sufficient by itself to prove paternity by a preponderance of the evidence when no action consistent with the allegation of paternity has been taken during the putative

INDIAN PROBATE--Continued

CHILDREN, ILLEGITIMATE (See also INHERITING)--Continued

Generally--Continued

father's lifetime beyond the mother's naming the putative father at the hospital and/or to the child.

Estate of Emerson Eckiwadah, 27 IBIA 245 (Mar. 29, 1995)

CLAIM AGAINST ESTATE (See also DIVORCE, LIEN, LIMITATION ON ACTIONS, STATUTES OF LIMITATION)

Allowable Items

Where transcripts of Indian probate hearings are prepared, the responsibility for preparing them rests with the DOI. Accordingly, the cost of a transcript may not be charged against the estate.

Estate of Helen Fisher Parker, 27 IBIA 271 (Apr. 5, 1995)

EVIDENCE

Weight of Evidence

The standard of proof of paternity in Indian probate cases is preponderance of the evidence.

Absent strong extenuating circumstances, the mother's testimony at the probate hearing is not sufficient by itself to prove paternity by a preponderance of the evidence when no action consistent with the allegation of paternity has been taken during the putative

INDIAN PROBATE--Continued

EVIDENCE--Continued

Weight of Evidence--Continued

father's lifetime beyond the mother's naming the putative father at the hospital and/or to the child.

Estate of Emerson Eckiwaudah, 27 IBIA 245 (Mar. 29, 1995)

HEARING (See also ADMINISTRATIVE PROCEDURE, REHEARING)

Record

Where transcripts of Indian probate hearings are prepared, the responsibility for preparing them rests with the DOI. Accordingly, the cost of a transcript may not be charged against the estate.

Estate of Helen Fisher Parker, 27 IBIA 271 (Apr. 5, 1995)

STATE LAW

Generally

Paternity in an Indian probate case is a question of Federal, not state, law. State law evidentiary standards for determining paternity do not apply in Indian probate proceedings.

Estate of Emerson Eckiwaudah, 27 IBIA 245 (Mar. 29, 1995)

INDIAN PROBATE--Continued

WILLS (See also CONTRACT TO MAKE WILL, INHERITING)

Construction of

The principal criterion guiding the construction of an Indian will is the intention of the testator, if that intention can be reasonably ascertained.

Estate of Margaret Fisher Leader Molina, 27 IBIA 254 (Mar. 29, 1995)

Undue Influence

To invalidate an Indian will on the grounds of undue influence, it must be shown that (1) the decedent was susceptible of being dominated by another; (2) the person allegedly influencing the decedent in the execution of her will was capable of controlling her mind and actions; (3) such a person did exert influence upon the decedent of a nature calculated to induce or coerce her to make a will contrary to her own desires; and (4) the will is contrary to the decedent's own desires.

When the evidence shows that the principal beneficiary under an Indian will was in a confidential relationship with the testator and actively participated in the preparation of the will, a rebuttable presumption of undue influence is raised, and the burden of rebutting the presumption is on the will proponent.

Even where a testator is entirely dependent upon a will beneficiary for shelter, food, and medication, a confidential relationship is not shown by these circumstances alone. Rather, in the cases where the Board of Indian Appeals has found that a confidential relationship existed, the will beneficiary has had control over the testator's finances.

Estate of Helen Fisher Parker, 27 IBIA 271 (Apr. 5, 1995)

INDIAN PROBATE--Continued

WITNESSES

Observation by Administrative Law Judge

If the ALJ deciding a case is not the Judge who held the hearing, the Board of Indian Appeals will review witness credibility determinations de novo.

Estate of Emerson Eckiwadah, 27 IBIA 245 (Mar. 29, 1995)

INDIANS

(See also Board of Indian Appeals, Bureau of Indian Affairs, Indian Probate)

GENERALLY

The Board of Indian Appeals is not required to consider evidence presented for the first time on appeal.

Ken Mosay & Mary Washington v. Minneapolis Area Director, Bureau of Indian Affairs, 27 IBIA 126 (Jan. 19, 1995)

There is nothing in Federal statutes, regulations, or case law, or in the trust relationship between Indian landowners and the Federal Government, which requires, authorizes, or even suggests the possibility that income from Indian trust land can be diminished based on its tax-free status.

Richard Gossett, Audrey Pentz, Judith Booth, Stewart Hutt, Richard Wells, & Kenneth McDonald v. Portland Area Director, Bureau of Indian Affairs, 28 IBIA 72 (June 19, 1995)

INDIANS--Continued

GENERALLY--Continued

Regulations in 25 CFR 2.12 and 43 CFR 4.332 require the BIA to assist an Indian or Indian tribal appellant not represented by counsel in regard to an appeal. This assistance consists of serving the appellant's filings on interested parties and allowing access to Government records and other documents. It does not include obtaining an attorney for the appellant or acting as the appellant's attorney by preparing the appellant's appeal documents or otherwise advising the appellant on the merits of the appeal.

Rose Evans v. Sacramento Area Director, Bureau of Indian Affairs, 28 IBIA 124 (Aug. 1, 1995)

The Board of Indian Appeals will not consider arguments that could and should have been raised in prior litigation concerning the identical subject matter.

The Board of Indian Appeals is not required to consider evidence and arguments raised for the first time in a reply brief.

Winlock Veneer Co. v. Juneau Area Director, Bureau of Indian Affairs, 28 IBIA 149 (Sept. 5, 1995)

The proviso in 40 U.S.C. § 483(a)(2) (1994), concerning the transfer of excess Federal real property to Oklahoma Indian tribes, applies only to property within the State of Oklahoma.

Wyandotte Tribe of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs, 28 IBIA 247 (Oct. 25, 1995)

INDIANS--Continued

CIVIL RIGHTS

Indian Civil Rights Act of 1968

In implementing the government-to-government relationship with an Indian tribe, the BIA has the authority and responsibility to decline to recognize the results of a tribal election when the election was tainted by a violation of the Indian Civil Rights Act, 25 U.S.C. § 1302 (1988). The fact that the Bureau bears this responsibility, however, does not mean that tribal members seeking to challenge an election may bypass a tribal forum in order to allege violations of the Act before the Bureau.

Ken Mosay & Mary Washington v. Minneapolis Area Director, Bureau of Indian Affairs, 27 IBIA 126 (Jan. 19, 1995)

CONTRACTS

Generally

The construction of leases of Indian land is a matter of Federal law, as developed in decisions of the Federal courts and the Board of Indian Appeals. Where there are no Federal cases on point, state law may furnish a convenient source for the general law of contracts to the extent it does not conflict with the Federal interest in developing and protecting the use of Indian resources.

A lease of Indian land should be strictly construed to avoid a forfeiture. However, when the terms of the lease clearly provide for forfeiture, the forfeiture may be enforced.

The BIA is bound by the terms of leases it has approved, when the leases are not in conflict with governing regulations. Where such a lease clearly provides for the forfeiture of certain rights, the Bureau lacks authority to grant relief from forfeiture over the objection of a party to the lease and/or a

INDIANS--Continued

CONTRACTS--Continued

Generally--Continued

party for whose benefit the forfeiture provision was included in the lease.

Kearny Street Real Estate Co., L. P. v. Sacramento Area Director, Bureau of Indian Affairs, 28 IBIA 4 (May 16, 1995)

FINANCIAL MATTERS

Financial Assistance

Decisions concerning whether a tribe's application for a Small Tribes grant should be funded are committed to the discretion of BIA. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

Allakaket Village Council, Grayling IRA Council, Koyukuk Tribal Council, & Alatna Village Council, 27 IBIA 190 (Mar. 3, 1995)

General assistance benefits may not be terminated because of the recipient's failure to comply with a requirement which is not clearly set out in the regulations governing the general assistance program and of which the recipient has not otherwise been informed.

Darwin Moore v. Portland Area Director, Bureau of Indian Affairs, 28 IBIA 58 (June 9, 1995)

INDIANS--Continued

FINANCIAL MATTERS--Continued

Individual Indian Money Accounts

In determining what claims may be paid from an IIM account, the BIA is bound by the trust responsibility of the United States toward the individual Indian for whom the funds are held.

The Board of Indian Appeals will not find estoppel against the BIA where the party advocating estoppel seeks payment from funds held in an IIM account.

Muscogee (Creek) Nation v. Muskogee Area Director,
Bureau of Indian Affairs, 28 IBIA 24 (May 18, 1995)

INDIAN CHILD WELFARE ACT OF 1978

Child Custody Proceedings

Where BIA regulations provide for appeals of certain decisions to the Ass't Secretary--Indian Affairs, the Ass't Secretary may refer the appeal to the Board of Indian Appeals under 43 CFR 4.330(a)(2). Absent a referral, however, the Board lacks jurisdiction over such appeals.

Under 25 CFR 2.7(a), it is the responsibility of a BIA deciding official to give notice of the decision to all interested parties known to the official.

Where a BIA regulation requires that a decision be issued within a certain time, the Board of Indian Appeals will not find the Bureau estopped by its delay in issuing a decision where the party seeking estoppel had a regulatory right to appeal from the Bureau's delay but failed to exercise that right.

The BIA regulation implementing 25 U.S.C. § 1912(b) (1994), does not authorize Bureau payment of attorney

INDIANS--Continued

INDIAN CHILD WELFARE ACT OF 1978--Continued

Child Custody Proceedings--Continued

fees in voluntary child custody proceedings in State courts. 25 CFR 23.13.

Karen Spears v. Sacramento Area Director, Bureau of Indian Affairs, 28 IBIA 161 (Sept. 8, 1995)

Financial Grant Applications

Generally

Appeals under 25 CFR 23.63 and 25 CFR 2.8, alleging official inaction relating to tribal applications for grant funding under the Indian Child Welfare Act, are properly before the Ass't Secretary--Indian Affairs pursuant to the review authority established in 25 CFR 23.61.

Central Council of Tlingit & Haida Indian Tribes of Alaska v. Acting Chief, Div. of Social Services, BIA, 28 IBIA 206 (Sept. 26, 1995)

INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT

Generally

When legislation enacted during the pendency of an appeal alters the premise of a BIA decision concerning the service population under an Indian Self-Determination Act contract, the Board of Indian Appeals will remand the matter to the Bureau for issuance of a new decision taking the new law into account.

Douglas Indian Ass'n v. Juneau Area Director, Bureau of Indian Affairs, 27 IBIA 292 (Apr. 18, 1995)

INDIANS--Continued

INDIVIDUAL TRUST OR RESTRICTED LANDS

Generally

In some circumstances, where individual Indian landowners have authorized the inclusion of their land in a grazing unit and have also authorized a BIA Superintendent to take certain actions on their behalf, the landowners may be deemed to have authorized the Superintendent to represent them in an appeal before the Board of Indian Appeals. However, the Board must determine, on a case-by-case basis, whether such representation is appropriate.

Ted Lopez, Luke Lopez, and David Lopez v. Acting Aberdeen Area Director, Bureau of Indian Affairs, 29 IBIA 5 (Dec. 12, 1995)

JUDGMENT FUNDS

Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.

Under 25 U.S.C. § 1226 (1988), unclaimed judgment fund per capita shares of "Peoria descendants" revert to the Peoria Tribe of Indians of Oklahoma.

Peoria Tribe of Indians of Oklahoma v. Acting Muskogee Area Director, Bureau of Indian Affairs, 27 IBIA 113 (Jan. 5, 1995)

INDIANS--Continued

LANDS

Generally

The Board of Indian Appeals is not a court of general jurisdiction, but has only that authority delegated to it by the Secretary of the Interior. It has not been delegated authority to determine the validity of a deed to trust land or to rewrite such a deed.

Cherokee Nation v. Acting Muskogee Area Director,
Bureau of Indian Affairs, 29 IBIA 17 (Dec. 15, 1995)

Allotments

Partition

25 U.S.C. § 378 (1988), governs partition of trust allotments on reservations where the governing tribe rejected the IRA, 25 U.S.C. § 461 (1988).

Neither 25 U.S.C. § 378 (1988), nor 25 CFR 152.33(b) requires that all co-owners of a trust allotment agree to a partition of the allotment.

In reviewing a BIA decision concerning whether an allotment should be partitioned, the Board of Indian Appeals does not substitute its judgment for that of the Bureau. Rather, the Board's responsibility is to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

The trust responsibility does not require that the BIA partition an allotment for the benefit of one co-owner when it finds that partition would be detrimental to the interests of the other co-owners.

Kenneth W. Davis v. Acting Aberdeen Area Director,
Bureau of Indian Affairs, 27 IBIA 281 (Apr. 6, 1995)

INDIANS--Continued

LANDS--Continued

Assignments

When a tribal member seeks approval by BIA of a lease of tribal land assigned to him/her, that individual must begin by showing that he/she is in fact the legally recognized assignee.

It is within the discretion of BIA, in exercising its trust responsibility to a tribal landowner, to determine that a lease of assigned tribal lands which directs all of the income to the assignee does not appropriately benefit the tribe.

Lois Candelaria v. Sacramento Area Director, Bureau of Indian Affairs, 27 IBIA 137 (Jan. 24, 1995)

Fair_Rental_Value

The role of the Board of Indian Appeals in reviewing a BIA determination of fair rental value is to determine whether the decision is reasonable; that is, whether it is supported by law and substantial evidence. An appellant who challenges a rental adjustment for a lease of Indian land bears the burden of proving that the adjustment is unreasonable.

Richard Gossett, Audrey Pentz, Judith Booth, Stewart Hutt, Richard Wells, & Kenneth McDonald v. Portland Area Director, Bureau of Indian Affairs, 28 IBIA 72 (June 19, 1995)

INDIANS--Continued

LANDS--Continued

Trespass

Damages

Under 25 CFR 166.24(b), a BIA Superintendent is required to take action to collect penalties and damages from the owner of cattle grazing in trespass upon trust or restricted Indian lands. The fact that the Indian landowners may have another remedy against the trespasser does not relieve the Bureau of its duties under this regulatory provision.

Where cattle belonging to an alleged trespasser are repeatedly found in trespass upon Indian land, a willful trespass is established.

Cheyenne River Sioux Tribe v. Acting Aberdeen Area Director, Bureau of Indian Affairs, 28 IBIA 288 (Nov. 24, 1995)

Tribal Lands

The definition of tribal lands for Federal purposes is a question of Federal, not tribal, law.

BIA owes a trust responsibility to the owner of trust land. When the land is held in trust for an Indian tribe, the trust responsibility is owed to the tribe.

When a tribal member seeks approval by BIA of a lease of tribal land assigned to him/her, that individual must begin by showing that he/she is in fact the legally recognized assignee.

It is within the discretion of BIA, in exercising its trust responsibility to a tribal landowner, to determine that a lease of assigned tribal lands which

INDIANS--Continued

LANDS--Continued

Tribal_Lands--Continued

directs all of the income to the assignee does not appropriately benefit the tribe.

Lois Candelaria v. Sacramento Area Director, Bureau of Indian Affairs, 27 IBIA 137 (Jan. 24, 1995)

The BIA lacks authority to lease tribal land.

St. Mary Lake Lessees v. Acting Billings Area Director, Bureau of Indian Affairs, 27 IBIA 261 (Apr. 3, 1995)

Trust Acquisitions

The BIA's definition of a "former reservation" under 25 CFR 151.2(f), for purposes of acquisition of land in trust for Indians, is subject to de novo review by the Board of Indian Appeals.

For purposes of 25 CFR Part 151, the Citizen Band Potawatomi Indian Tribe and the Absentee-Shawnee Tribe both have rights in the former Potawatomi Reservation in Oklahoma, and neither is required to obtain the consent of the other under 25 CFR 151.8.

Citizen Band Potawatomi Indian Tribe of Oklahoma v. Anadarko Area Director, Bureau of Indian Affairs, 28 IBIA 169 (Sept. 12, 1995)

INDIANS--Continued

LEASES AND PERMITS

Generally

A lease issued under the IMLA, 25 U.S.C. § 396a-396f (1988), does not expire because of a temporary shut-in caused by a mechanical breakdown or accident, as long as the shut-in does not continue beyond the time reasonably necessary to make repairs and resume production.

Where a lease issued under the IMLA, 25 U.S.C. § 396a-396f (1988), has been shut in due to a mechanical breakdown or accident, and it must be determined whether the operator has made repairs and resumed production within a reasonable time, a "reasonable time" is the amount of time it would take a prudent operator of the same size and type to accomplish these tasks.

Where a lease issued under the IMLA, 25 U.S.C. § 396a-396f (1988), has been shut in due to a mechanical breakdown or accident, and it must be determined whether the operator has made repairs and resumed production within a reasonable time, the determination will be based solely on actions directly related to the making of repairs and resumption of production.

Citation Oilfield Supply & Leasing, Ltd., & Murphy Oil U.S.A., Inc. v. Acting Billings Area Director, Bureau of Indian Affairs, 27 IBIA 210 (Mar. 7, 1995)

The BIA lacks authority to lease tribal land.

St. Mary Lake Lessees v. Acting Billings Area Director, Bureau of Indian Affairs, 27 IBIA 261 (Apr. 3, 1995)

INDIANS--Continued

LEASES AND PERMITS--Continued

Generally--Continued

The construction of leases of Indian land is a matter of Federal law, as developed in decisions of the Federal courts and the Board of Indian Appeals. Where there are no Federal cases on point, state law may furnish a convenient source for the general law of contracts to the extent it does not conflict with the Federal interest in developing and protecting the use of Indian resources.

A lease of Indian land should be strictly construed to avoid a forfeiture. However, when the terms of the lease clearly provide for forfeiture, the forfeiture may be enforced.

The BIA is bound by the terms of leases it has approved, when the leases are not in conflict with governing regulations. Where such a lease clearly provides for the forfeiture of certain rights, the Bureau lacks authority to grant relief from forfeiture over the objection of a party to the lease and/or a party for whose benefit the forfeiture provision was included in the lease.

Kearny Street Real Estate Co., L. P. v. Sacramento Area Director, Bureau of Indian Affairs, 28 IBIA 4 (May 16, 1995)

Where an Indian oil and gas lease is included in a communitization agreement, and the only producing well in the communitized area is located on the Indian lease, a person with an interest in the communitization agreement has standing to challenge a BIA determination that the Indian lease has expired.

Where the term of an Indian oil and gas lease is for a specified term and "as much longer thereafter as oil and/or gas is produced in paying quantities," the

INDIANS--Continued

LEASES AND PERMITS--Continued

Generally--Continued

lease does not expire as long as either oil or gas is produced in paying quantities.

McCulliss Resources Co., Inc. v. Acting Phoenix Area Director, Bureau of Indian Affairs, 28 IBIA 268
(Oct. 30, 1995)

Farming and Grazing

Under 25 CFR 166.24(b), a BIA Superintendent is required to take action to collect penalties and damages from the owner of cattle grazing in trespass upon trust or restricted Indian lands. The fact that the Indian landowners may have another remedy against the trespasser does not relieve the Bureau of its duties under this regulatory provision.

Where cattle belonging to an alleged trespasser are repeatedly found in trespass upon Indian land, a willful trespass is established.

Cheyenne River Sioux Tribe v. Acting Aberdeen Area Director, Bureau of Indian Affairs, 28 IBIA 288
(Nov. 24, 1995)

In some circumstances, where individual Indian landowners have authorized the inclusion of their land in a grazing unit and have also authorized a BIA Superintendent to take certain actions on their behalf, the landowners may be deemed to have authorized the Superintendent to represent them in an appeal before the Board of Indian Appeals. However, the Board must

INDIANS--Continued

LEASES AND PERMITS--Continued

Farming and Grazing--Continued

determine, on a case-by-case basis, whether such representation is appropriate.

Ted Lopez, Luke Lopez, and David Lopez v. Acting
Aberdeen Area Director, Bureau of Indian Affairs,
29 IBIA 5 (Dec. 12, 1995)

Rental_Rates

The role of the Board of Indian Appeals in reviewing a BIA determination of fair rental value is to determine whether the decision is reasonable; that is, whether it is supported by law and substantial evidence. An appellant who challenges a rental adjustment for a lease of Indian land bears the burden of proving that the adjustment is unreasonable.

A lessee of Indian trust or restricted property lacks standing to raise an alleged violation of 25 CFR 162.8 as it relates to written concurrence of the landowner in a rental rate adjustment.

The BIA has discretion on a case-by-case basis to determine what methodology should be used to determine fair annual rental in making adjustments to the rental rates for leased trust land. No decision of the Board of Indian Appeals requires that a particular methodology be used.

There is nothing in Federal statutes, regulations, or case law, or in the trust relationship between Indian landowners and the Federal Government, which requires, authorizes, or even suggests the possibility that income

INDIANS--Continued

LEASES AND PERMITS--Continued

Rental_Rates--Continued

from Indian trust land can be diminished based on its tax-free status.

Richard Gossett, Audrey Pentz, Judith Booth, Stewart Hutt, Richard Wells, & Kenneth McDonald v. Portland Area Director, Bureau of Indian Affairs, 28 IBIA 72 (June 19, 1995)

Secretarial Approval

When a tribal member seeks approval by BIA of a lease of tribal land assigned to him/her, that individual must begin by showing that he/she is in fact the legally recognized assignee.

It is within the discretion of BIA, in exercising its trust responsibility to a tribal landowner, to determine that a lease of assigned tribal lands which directs all of the income to the assignee does not appropriately benefit the tribe.

Lois Candelaria v. Sacramento Area Director, Bureau of Indian Affairs, 27 IBIA 137 (Jan. 24, 1995)

MINERAL RESOURCES

Oil and Gas

Generally

A lease issued under the IMLA, 25 U.S.C. § 396a-396f (1988), does not expire because of a temporary

INDIANS--Continued

MINERAL RESOURCES--Continued

Oil and Gas--Continued

Generally--Continued

shut-in caused by a mechanical breakdown or accident, as long as the shut-in does not continue beyond the time reasonably necessary to make repairs and resume production.

Where a lease issued under the IMLA, 25 U.S.C. § 396a-396f (1988), has been shut in due to a mechanical breakdown or accident, and it must be determined whether the operator has made repairs and resumed production within a reasonable time, a "reasonable time" is the amount of time it would take a prudent operator of the same size and type to accomplish these tasks.

Where a lease issued under the IMLA, 25 U.S.C. § 396a-396f (1988), has been shut in due to a mechanical breakdown or accident, and it must be determined whether the operator has made repairs and resumed production within a reasonable time, the determination will be based solely on actions directly related to the making of repairs and resumption of production.

Citation Oilfield Supply & Leasing, Ltd., & Murphy Oil U.S.A., Inc. v. Acting Billings Area Director, Bureau of Indian Affairs, 27 IBIA 210 (Mar. 7, 1995)

Where the term of an Indian oil and gas lease is for a specified term and "as much longer thereafter as oil and/or gas is produced in paying quantities," the lease does not expire as long as either oil or gas is produced in paying quantities.

McCulliss Resources Co., Inc. v. Acting Phoenix Area Director, Bureau of Indian Affairs, 28 IBIA 268 (Oct. 30, 1995)

INDIANS--Continued

MINERAL RESOURCES--Continued

Oil and Gas--Continued

Communitization Agreements

Where an Indian oil and gas lease is included in a communitization agreement, and the only producing well in the communitized area is located on the Indian lease, a person with an interest in the communitization agreement has standing to challenge a BIA determination that the Indian lease has expired.

McCulliss Resources Co., Inc. v. Acting Phoenix Area Director, Bureau of Indian Affairs, 28 IBIA 268 (Oct. 30, 1995)

Royalties

MMS properly required the lessee of a Federal Indian allottee oil and gas lease to review royalty accounts and to compute and pay additional royalties where an MMS audit demonstrated a systemic underpayment of royalties in 4 of 6 test months.

Texaco Exploration and Production, Inc., 134 IBLA 267 (Dec. 1, 1995)

Tribal Lands

Under 43 CFR 3161.2 and 3162.2(c) BLM may require the operating rights owner to promptly drill and produce a well when it determines such a well is reasonably required in order that the lease may be properly and timely developed and produced in accordance with good economic practices.

Great Western Onshore Inc., 133 IBLA 386 (Sept. 22, 1995)

INDIANS--Continued

MINERAL RESOURCES--Continued

Oil and Gas--Continued

Tribal Lands--Continued

In the absence of a market for gas at the wellhead where production would ordinarily be sold and valued, the Department may authorize the deduction of a transportation allowance from the market value of the gas to reflect the costs incurred in transporting the gas from the leasehold to the first available market.

No deduction for royalty valuation purposes is allowed for transportation costs incurred in moving production from the wellhead to a selling point within that lease nor are the costs of transporting lease production beyond the point of the nearest potential market deductible from value for royalty purposes.

Viersen & Cochran, 134 IBLA 155 (Nov. 9, 1995)

RESERVATIONS

Generally

The main part of 40 U.S.C. § 483(a)(2) (1994), concerning the transfer of excess Federal real property to Indian tribes, applies to such property located within a current Indian reservation.

Wyandotte Tribe of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs, 28 IBIA 247 (Oct. 25, 1995)

INDIANS--Continued

RESERVATIONS--Continued

Definition

The BIA's definition of a "former reservation" under 25 CFR 151.2(f), for purposes of acquisition of land in trust for Indians, is subject to de novo review by the Board of Indian Appeals.

For purposes of 25 CFR Part 151, the Citizen Band Potawatomi Indian Tribe and the Absentee-Shawnee Tribe both have rights in the former Potawatomi Reservation in Oklahoma, and neither is required to obtain the consent of the other under 25 CFR 151.8.

Citizen Band Potawatomi Indian Tribe of Oklahoma v. Anadarko Area Director, Bureau of Indian Affairs,
28 IBIA 169 (Sept. 12, 1995)

SOCIAL SERVICES

General assistance benefits may not be terminated because of the recipient's failure to comply with a requirement which is not clearly set out in the regulations governing the general assistance program and of which the recipient has not otherwise been informed.

Darwin Moore v. Portland Area Director, Bureau of Indian Affairs, 28 IBIA 58 (June 9, 1995)

INDIANS--Continued

TIMBER RESOURCES

Timber_Sales_Contracts

Breach and Damages

In determining whether damages should be awarded following the breach of a contract for the sale of trust timber, the standard is whether the non-breaching party exercised ordinary reasonable care in attempting to mitigate damages.

Winlock Veneer Co. v. Juneau Area Director, Bureau of Indian Affairs, 28 IBIA 149 (Sept. 5, 1995)

TRIBAL GOVERNMENT

Generally

In resolving intra-tribal disputes, nonjudicial tribal institutions have been recognized as competent law-applying bodies.

Jeff Hunt; John Gray & Desiree Gray; Ramon L. ("Sharky") Williams & Ramona Williams; Vivian T. Sampson & Celinda Traversie; Rusty Brehmer; Marty Lawrence; Tina Clement; Sharon Eaton; & Jeff Hunt & Vicki Hunt v. Aberdeen Area Director, Bureau of Indian Affairs, 27 IBIA 173 (Feb. 9, 1995)

Constitutions, Bylaws, and Ordinances

Where Secretarial review of tribal legislation is required by a tribal constitution, but not by Federal law, the Secretary's review authority is only as broad as the tribal constitution provides. Thus, where the

INDIANS--Continued

TRIBAL GOVERNMENT--Continued

Constitutions, Bylaws, and Ordinances--Continued

constitution establishes a time limit for Secretarial review, the Secretary lacks authority to act on the ordinance once the review period has expired.

Although the Board of Indian Appeals has jurisdiction over an appeal from a BIA Area Director's approval of a tribal ordinance, it has authority to abstain in a case where it finds that primary jurisdiction lies with a tribal court.

Zinke & Trumbo, Ltd; Enron Oil & Gas Co.; Quinex Energy Corp.; Wasatch Well Service, Inc.; Geoscout Land & Title Co.; Payne Land Services; Questar Pipeline Co., et al.; & Gary-Williams Energy Corp. v. Phoenix Area Director, Bureau of Indian Affairs, 27 IBIA 105 (Jan. 5, 1995)

The BIA has authority to interpret a tribal constitution in order to carry out its ordinance approval responsibility under the constitution. However, where the tribe has put forth a reasonable interpretation of its constitution, the Bureau must defer to that interpretation.

Where a tribe has adopted a constitution requiring BIA review or approval of certain of its ordinances, the approval requirement is a matter of tribal law and may be repealed through adoption of a constitutional amendment.

When officials of the DOI are called upon to interpret tribal constitutions, they should employ the same rules of statutory construction as are applicable to Federal and state constitutions and statutes.

INDIANS--Continued

TRIBAL GOVERNMENT--Continued

Constitutions, Bylaws, and Ordinances--Continued

Under established rules of statutory construction, a statute should be interpreted so as not to render one part inoperative.

Shakopee Mdewakanton Sioux Community v. Acting Minneapolis Area Director, Bureau of Indian Affairs, 27 IBIA 163 (Feb. 8, 1995)

Individual tribal members lack standing to appeal a BIA's decision approving or disapproving a tribal ordinance or resolution.

Jeff Hunt; John Gray & Desiree Gray; Ramon L. ("Sharky") Williams & Ramona Williams; Vivian T. Sampson & Celinda Traversie; Rusty Brehmer; Marty Lawrence; Tina Clement; Sharon Eaton; & Jeff Hunt & Vicki Hunt v. Aberdeen Area Director, Bureau of Indian Affairs, 27 IBIA 173 (Feb. 9, 1995)

The BIA must defer to a tribe's reasonable interpretation of its governing document.

San Manuel Band of Mission Indians v. Sacramento Area Director, Bureau of Indian Appeals, 27 IBIA 204 (Mar. 6, 1995)

Elections

In implementing the government-to-government relationship with an Indian tribe, the BIA has the authority and responsibility to decline to recognize the results of a tribal election when the election was tainted by a violation of the Indian Civil Rights Act, 25 U.S.C. § 1302 (1988). The fact that the Bureau bears this responsibility, however, does not mean that tribal

INDIANS--Continued

TRIBAL GOVERNMENT--Continued

Elections--Continued

members seeking to challenge an election may bypass a tribal forum in order to allege violations of the Act before the Bureau.

Ken Mosay & Mary Washington v. Minneapolis Area Director, Bureau of Indian Affairs, 27 IBIA 126 (Jan. 19, 1995)

Where the results of a tribal election have been certified by a properly constituted and authorized tribal body, the BIA should recognize the election results on at least an interim basis, pending resolution of any election disputes in a tribal forum.

Raymond Gonzales et al., Elmer Torres et al. v. Acting Albuquerque Area Director, Bureau of Indian Affairs, 28 IBIA 229 (Oct. 23, 1995)

Judicial_System

Although the Board of Indian Appeals has jurisdiction over an appeal from a BIA Area Director's approval of a tribal ordinance, it has authority to abstain in a case where it finds that primary jurisdiction lies with a tribal court.

Zinke & Trumbo, Ltd; Enron Oil & Gas Co.; Quinex Energy Corp.; Wasatch Well Service, Inc.; Geoscout Land & Title Co.; Payne Land Services; Questar Pipeline Co., et al.; & Gary-Williams Energy Corp. v. Phoenix Area Director, Bureau of Indian Affairs, 27 IBIA 105 (Jan. 5, 1995)

INDIANS--Continued

TRIBAL GOVERNMENT--Continued

Judicial_System--Continued

In a case where exhaustion of tribal remedies is required, appellants before the Board of Indian Appeals cannot avoid the requirement simply by alleging that the tribal court lacks jurisdiction over the matter at issue. Instead, they must take the matter to the tribal court so that the court may determine its own jurisdiction.

Ken Mosay & Mary Washington v. Minneapolis Area Director, Bureau of Indian Affairs, 27 IBIA 126 (Jan. 19, 1995)

Tribal remedies are not exhausted when a party files an action in tribal court, but fails to complete the entire process available or required under the court rules, including appellate review, if available. An individual cannot rely on the unsuccessful action of another party to argue that exhaustion is futile.

Jeff Hunt; John Gray & Desiree Gray; Ramon L. ("Sharky") Williams & Ramona Williams; Vivian T. Sampson & Celinda Traversie; Rusty Brehmer; Marty Lawrence; Tina Clement; Sharon Eaton; & Jeff Hunt & Vicki Hunt v. Aberdeen Area Director, Bureau of Indian Affairs, 27 IBIA 173 (Feb. 9, 1995)

Where the results of a tribal election have been certified by a properly constituted and authorized tribal body, the BIA should recognize the election results on at least an interim basis, pending resolution of any election disputes in a tribal forum.

In a case where exhaustion of tribal remedies is required, appellants before the Board of Indian Appeals cannot avoid the requirement simply by

INDIANS--Continued

TRIBAL GOVERNMENT--Continued

Judicial_System--Continued

alleging that the tribal court would be biased against them.

Raymond Gonzales et al., Elmer Torres et al. v. Acting Albuquerque Area Director, Bureau of Indian Affairs,
28 IBIA 229 (Oct. 23, 1995)

TRIBAL POWERS

Tribal_Sovereignty

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INDIANS--Continued

TRIBAL POWERS--Continued

Tribal_Sovereignty--Continued

alleging that the tribal court would be biased against them.

Raymond Gonzales et al., Elmer Torres et al. v. Acting Albuquerque Area Director, Bureau of Indian Affairs,
28 IBIA 229 (Oct. 23, 1995)

TRUST RESPONSIBILITY

BIA owes a trust responsibility to the owner of trust land. When the land is held in trust for an Indian tribe, the trust responsibility is owed to the tribe.

It is within the discretion of BIA, in exercising its trust responsibility to a tribal landowner, to determine that a lease of assigned tribal lands which directs all of the income to the assignee does not appropriately benefit the tribe.

Lois Candelaria v. Sacramento Area Director, Bureau of Indian Affairs, 27 IBIA 137 (Jan. 24, 1995)

The trust responsibility does not require that the BIA partition an allotment for the benefit of one co-owner when it finds that partition would be detrimental to the interests of the other co-owners.

Kenneth W. Davis v. Acting Aberdeen Area Director, Bureau of Indian Affairs, 27 IBIA 281 (Apr. 6, 1995)

INDIANS--Continued

TRUST RESPONSIBILITY--Continued

In determining what claims may be paid from an IIM account, the BIA is bound by the trust responsibility of the United States toward the individual Indian for whom the funds are held.

Muscogee (Creek) Nation v. Muskogee Area Director,
Bureau of Indian Affairs, 28 IBIA 24 (May 18, 1995)

The specific circumstances of each case will determine whether the Federal trust responsibility is owed to an Indian tribe, an individual Indian, or both.

Cherokee Nation v. Acting Muskogee Area Director,
Bureau of Indian Affairs, 29 IBIA 17 (Dec. 15, 1995)

WATER AND POWER RESOURCES

Water Rights

An allottee has a vested right to a "just and equal distribution" of water for irrigation purposes while an allotment remains in trust. The General Allotment Act secured water to allottees where necessary for farming. 25 U.S.C. § 381. An allottee can claim a share of reserved water rights, at least as far as agricultural irrigation is concerned.

Indian tribes possess broad regulatory power over reservation water resources, including those of allottees. A tribe's sovereign power includes some authority to allocate water to allotments and to determine the parameters of its use. A tribe's regulatory authority is circumscribed by both the Indian Civil Rights Act, 25 U.S.C. § 1301-1303, and

INDIANS--Continued

WATER AND POWER RESOURCES--Continued

Water Rights--Continued

the command of 25 U.S.C. § 381, that an allottee not be denied a "just and equal distribution" of irrigation water.

The quantity of water to which an allottee may be entitled is not subject to precise formulae. A "just and equal distribution" of agricultural water under 25 U.S.C. § 381 is necessarily dependent on the supply of water available upon any particular reservation.

Entitlements to Water Under the Southern Arizona Water Rights Settlement Act (SAWRSA), M-36982 (March 30, 1995)
102 I.D. 33

JUDICIAL REVIEW

(See also Administrative Procedure)

When the FERC issues a certificate of convenience and necessity for a natural gas pipeline that crossing public land and a petition for judicial review of the certificate is filed with the appropriate U.S. Court of Appeals, the exclusive judicial review provision of 15 U.S.C. § 717r (1988), does not deprive the Secretary of the Interior of his authority to review a decision of a subordinate approving a right-of-way for the pipeline. A motion to dismiss an appeal to the Board of Land Appeals (which exercises the Secretary's delegated administrative review authority) claiming the appeal to be a collateral attack on a FERC certificate authorizing the pipeline is properly denied.

Wyoming Independent Producers Ass'n, Independent Petroleum Ass'n of Mountain States, Wyoming Outdoor Council, National Trust for Historic Preservation,
133 IBLA 65 (July 13, 1995)

LACHES

BLM properly requires the holder of a communication site right-of-way to pay rental charges, in addition to those originally estimated at the time of issuance of the right-of-way grant, based upon an appraisal of the fair market rental value of the right-of-way grant. A delay of over 2 years between issuance of the right-of-way grant and notification to the holder of the appraised rental value does not relieve the right-of-way holder of the obligation to pay the appraised rental charges.

Michael D. Dahmer, 132 IBLA 17 (Jan. 23, 1995)

MATERIALS ACT

BLM may properly decline to approve an application for the small-scale mining and removal of mineral materials from public lands designated part of a desert bighorn sheep management area where BLM is in the process of defining permissible human activity within the area pursuant to its land-use planning authority under sec. 202 of FLPMA.

Jenott Mining Corp., 134 IBLA 191 (Nov. 21, 1995)

MILL SITES

(See also Mining Claims)

GENERALLY

Absent Federal ownership of minerals, land cannot be available for the location of claims under the mining laws, including the location of millsites.

Golden Arc Mining & Refining Inc., 133 IBLA 90 (July 14, 1995)

MINERAL LEASING ACT

(See also Bureau of Land Management, Coal Leases & Permits, Geothermal Leases, Oil & Gas Leases, Phosphate Leases & Permits, Potassium Leases & Permits, Sodium Leases & Permits)

GENERALLY

BLM may enforce a special stipulation in a coal lease, for the protection of a Federal reservoir, on surface lands which are privately owned.

Ark Land Co., 133 IBLA 31 (July 3, 1995)

A clause in a Federal coal lease stating it is issued "pursuant and subject to" all regulations of the Secretary of the Interior "now or hereafter in force" incorporates subsequent regulations relating to diligent development, continuous operations, and advanced royalty requirements.

Cyprus Western Coal Co. (On Judicial Remand), 133 IBLA 52 (July 11, 1995)

ROYALTIES

Black lung excise taxes are properly considered to be an element of the costs of mining and, as such, will not be allowed to be deducted from value for royalty computation purposes.

Meadowlark, Inc., 133 IBLA 5 (June 29, 1995)

MINERAL LEASING ACT--Continued

ROYALTIES--Continued

Where the record is inadequate to determine whether, in fact, appellant met the diligent development requirement under subsequent regulations incorporated in the lease, the matter will be remanded to MMS to compute royalty due.

Cyprus Western Coal Co. (On Judicial Remand), 133 IBLA 52 (July 11, 1995)

In the absence of a market for gas at the wellhead where production would ordinarily be sold and valued, the Department may authorize the deduction of a transportation allowance from the market value of the gas to reflect the costs incurred in transporting the gas from the leasehold to the first available market.

Absent a determination either that crucial facts were not disclosed or that express regulatory provisions were violated, an order of the U.S. Geological Survey authorizing a transportation allowance is not subject to retroactive reversal.

No deduction for royalty valuation purposes is allowed for transportation costs incurred in moving production from the wellhead to a selling point within that lease nor are the costs of transporting lease production beyond the point of the nearest potential market deductible from value for royalty purposes.

In order for a lessee to be entitled to deduct off-lease transportation costs for royalty purposes, a lessee must request, and the appropriate Departmental officer must approve, a transportation allowance.

Viersen & Cochran, 134 IBLA 155 (Nov. 9, 1995)

MINING CLAIMS

(See also Hearings, Millsites, Mineral Lands, Multiple Mineral Development Act, Surface Resources Act)

GENERALLY

A claim of estoppel against the United States will be rejected where there is no showing of affirmative misconduct in the nature of an erroneous statement of fact in an official written decision or where the effect of allowing estoppel would be to grant a right not authorized by law.

United States v. Hiram B. Webb, 132 IBLA 152 (Mar. 17, 1995)

A prima facie case that unpatented placer mining claims were invalid was established by expert testimony from BLM geologists that there had been no discovery of a valuable mineral deposit on the claims, neither when the land claimed was withdrawn from mineral entry nor at the time of hearing on the contest complaint filed by BLM.

United States v. Sandra K. Memmott et al., 132 IBLA 283 (May 2, 1995)

BLM properly rejected amended notices of location which sought to enlarge mining claims from 20 acres to 160 acres as such action would be adverse to the initial location and constitute a relocation or a new location of the claims.

Junior L. Dennis, 133 IBLA 329 (Aug. 31, 1995)

MINING CLAIMS--Continued

ABANDONMENT

Responsibility for satisfying the rental fee requirement of the Department of the Interior and Related Agencies Appropriations Act for FY 93, P.L. 102-381, 106 Stat. 1378-79 (1992), resides with the owner of the unpatented mining claim, millsite, or tunnel site, as Congress has mandated that failure to make the annual payment of the claim rental fee as required by the Act shall conclusively constitute an abandonment of the unpatented mining claim, millsite, or tunnel site by the claimant. Except for the small-miner exemption, there is no basis for BLM to grant a request for exemption from the rental fee requirements of that Act.

Idaho Mining & Development Co. et al., 132 IBLA 29
(Jan. 25, 1995)

When a check in payment of the mining claim rental fee is tendered by the due date and erroneously dishonored thereafter by the bank upon which it is drawn, the fee will be considered to have been timely tendered when bank officials acknowledge that the bank erred in not honoring the check when it was presented.

Gary L. Carter (On Reconsideration), 132 IBLA 46
(Feb. 10, 1995).

An applicant for a small miner exemption from payment of rental fees under the Act of Oct. 5, 1992, must file a certified statement by Aug. 31, 1993, for each of the assessment years (ending Sept. 1, 1993, and Sept. 1, 1994) for which the exemption is claimed including the information required by regulation at 43 CFR 3833.1-7(d). Where the applicant fails to pay the rental fee for either of the assessment years, the certificate of exemption includes only one year, and the record fails to indicate operations are being conducted pursuant to a

MINING CLAIMS--Continued

ABANDONMENT--Continued

notice or plan of operations, the claims are properly deemed abandoned and void.

Edwin L. Evans, 132 IBLA 103 (Feb. 27, 1995)

An applicant for a small miner exemption from payment of rental fees under the Act of Oct. 5, 1992, must file a certified statement by Aug. 31, 1993, for each of the assessment years (ending Sept. 1, 1993, and Sept. 1, 1994) for which the exemption is claimed. When the applicant fails to pay the rental fee for either of the assessment years and the certificate of exemption includes only 1 year, the claims are properly deemed abandoned and void.

Richard L. Shreves, 132 IBLA 138 (Mar. 15, 1995)

Under the Interior Department and Related Agencies Appropriations Act of 1993, P.L. 102-381, 106 Stat. 1374, enacted on Oct. 5, 1992, and 43 CFR 3833.1-5 (1993), a claimant who locates a claim on Aug. 27, 1993, and files a notice of location for the claim with BLM on Oct. 6, 1993, in accordance with sec. 314(b) of FLPMA, 43 U.S.C. § 1744(b) (1988), must pay rental fees for both the 1992-93 and the 1993-94 assessment years on the date of filing the notice of location.

Bonnie M. Brown, 132 IBLA 393 (June 14, 1995)

In order to qualify for a small miner exemption from the rental fee requirement of the Department of the Interior and Related Agencies Appropriations Act for FY 1993, a mining claim must meet all conditions set out in 43 CFR 3833.1-6(a) (1993). Where the surface estate of a claim is in Federal ownership and the claim is located on the banks of a Wild and Scenic River Study Area, the claim must be under an approved plan of operations as of Aug. 31, 1993. Where the claimant files a plan of

MINING CLAIMS--Continued

ABANDONMENT--Continued

operations for BLM's approval on Aug. 31, 1993, and BLM does not approve it on that date, the claim is not under an approved plan of operations as of the deadline.

Ronald E. Milar, 133 IBLA 214 (Aug. 2, 1995)

A decision denying a small miner's exemption and declaring claims abandoned and void for failure to pay rental fees on the grounds that the claimant owns more than 10 claims is properly vacated where the claimant shows that it filed certifications of exemption for the 1993 and 1994 assessment years on Aug. 26, 1993, listing only 10 claims, and where, at the same time, it recorded its Statement of Annual Assessment Work with the county recorder and filed notice with the FS for those same 10 claims. In those circumstances, the claimant has proven that it dropped two claims in order to meet the requirements of the small miner's exemption.

Washburn Mining Co., 133 IBLA 294 (Aug. 9, 1995)

A mining claimant who files a satisfactory certification of exemption from payment of rental fees is required to file in the proper BLM office evidence of assessment work performed within the time period prescribed in P.L. 102-381, 106 Stat. 1378-79 (1992), and failure to do so results in a conclusive presumption of abandonment of the mining claim.

Lee Jesse Peterson, 133 IBLA 381 (Sept. 21, 1995)

MINING CLAIMS--Continued

ASSESSMENT WORK

Compliance with sec. 314(a) of FLPMA, 43 U.S.C. § 1744(a) (1988), is accomplished by the annual filing of a copy of either proof of assessment work performed or a notice of intention to hold the mining claim. Compliance with the requirements of the assessment statute, 30 U.S.C. § 28 (1988), is accomplished only by the actual performance of the assessment work or by obtaining a deferment of the assessment work. Compliance with one of the foregoing statutes does not constitute compliance with the other.

United States v. Hiram B. Webb, 132 IBLA 152 (Mar. 17, 1995)

COMMON VARIETIES OF MINERALS

Generally

A placer mining claim for a common variety mineral is properly declared null and void where the mining claimant relies on 30 U.S.C. § 38 (1988), but fails to affirmatively show that he held and worked the claim for the requisite period of time prior to the July 23, 1955, effective date of the Common Varieties Act, 30 U.S.C. § 611 (1988).

United States v. Hiram B. Webb, 132 IBLA 152 (Mar. 17, 1995)

CONTESTS

A prima facie case that unpatented placer mining claims were invalid was established by expert testimony from BLM geologists that there had been no discovery of a valuable mineral deposit on the claims, neither when the land claimed was withdrawn from mineral entry nor at

MINING CLAIMS--Continued

CONTESTS--Continued

the time of hearing on the contest complaint filed by BLM.

United States v. Sandra K. Memmott et al., 132 IBLA 283 (May 2, 1995)

DETERMINATION OF VALIDITY

A placer mining claim for a common variety mineral is properly declared null and void where the mining claimant relies on 30 U.S.C. § 38 (1988), but fails to affirmatively show that he held and worked the claim for the requisite period of time prior to the July 23, 1955, effective date of the Common Varieties Act, 30 U.S.C. § 611 (1988).

United States v. Hiram B. Webb, 132 IBLA 152 (Mar. 17, 1995)

DISCOVERY

Generally

A placer mining claim for a common variety mineral is properly declared null and void where the mining claimant relies on 30 U.S.C. § 38 (1988), but fails to affirmatively show that he held and worked the claim for the requisite period of time prior to the July 23, 1955, effective date of the Common Varieties Act, 30 U.S.C. § 611 (1988).

United States v. Hiram B. Webb, 132 IBLA 152 (Mar. 17, 1995)

MINING CLAIMS--Continued

DISCOVERY--Continued

Generally--Continued

A prima facie case that unpatented placer mining claims were invalid was established by expert testimony from BLM geologists that there had been no discovery of a valuable mineral deposit on the claims, neither when the land claimed was withdrawn from mineral entry nor at the time of hearing on the contest complaint filed by BLM.

United States v. Sandra K. Memmott et al., 132 IBLA 283 (May 2, 1995)

HEARINGS

Evidence offered for the first time during appeal from a decision in a mining claim contest could only be reviewed to determine whether another hearing should be ordered; since the offer made did not tend to show there was some likelihood of success on the merits at rehearing and it was not explained why the evidence was not offered at the contest hearing, another hearing was not required.

United States v. Sandra K. Memmott et al., 132 IBLA 283 (May 2, 1995)

LANDS SUBJECT TO

A placer mining claim which, at the time of location, partially included land not open to mineral entry, is properly declared null and void ab initio as to such land.

Wayne J. Brewer, 132 IBLA 220 (Apr. 11, 1995)

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

Land acquired by the United States subject to a reservation of minerals was unavailable for location of a mining claim.

Robert D. Davis, 132 IBLA 253 (Apr. 17, 1995)

Unpatented lode mining claims were properly declared null and void because they were located on land not subject to mineral entry.

Maurice E. Jones, 133 IBLA 50 (July 6, 1995)

In evaluating descriptions of placer mining claim locations, BLM correctly found that any portions of the claims that extended into lands withdrawn from mineral entry were null and void ab initio.

Jackie Ivankovich et al., 133 IBLA 61 (July 12, 1995)

In evaluating sketch maps provided by a mining claimant that indicated portions of his placer claims extended onto lands withdrawn from mineral entry, BLM correctly found that any portions of the claims that extended onto the withdrawn lands were null and void ab initio.

Marvin Allen, 133 IBLA 94 (July 17, 1995)

Land which has been patented to a railroad without a reservation of minerals to the United States is not available for the location of mining claims, and a mining claim located on such land after it is so conveyed is null and void ab initio.

Stacy B. Good, 133 IBLA 119 (July 26, 1995)

MINING CLAIMS--Continued

LANDS SUBJECT TO--Continued

Placer mining claims were invalid because they were located on land licensed for a power project that was closed to mineral entry under sec. 2(a) of the Mining Claims Rights Restoration Act of 1955.

Alan Bruce, 133 IBLA 297 (Aug. 9, 1995)

Those portions of mining claims located on lands subject to a material site right-of-way grant issued pursuant to sec. 317 of the Federal Aid Highway Act, 23 U.S.C. § 317 (1988), and a material site right-of-way granted under the Act of Nov. 9, 1921, 23 U.S.C. § 18 (1946), are properly declared null and void ab initio.

Paul Tobeler, 133 IBLA 361 (Sept. 14, 1995)

LOCATABILITY OF MINERAL

Generally

A prima facie case that unpatented placer mining claims were invalid was established by expert testimony from BLM geologists that there had been no discovery of a valuable mineral deposit on the claims, neither when the land claimed was withdrawn from mineral entry nor at the time of hearing on the contest complaint filed by BLM.

United States v. Sandra K. Memmott et al., 132 IBLA 283 (May 2, 1995)

MINING CLAIMS--Continued

LOCATION

In order to satisfy the requirements for a placer location where the location is not made by legal subdivisions in conformity to a survey, the location must be distinctly marked on the ground so that its boundaries can be readily traced and the claim's location notice must include a description of the claim tied to a natural object or permanent monument sufficient to identify the claim. While a locator need not submit a precise description of the position of the claim, the description must generally be adequate to enable the claim to be found and identified by following the recorded description. Where the claimant contends that the actual situs of the claim on the ground differs from the recorded description, the claimant has the burden of showing that the claim was properly located at the position asserted.

While the provisions of 30 U.S.C. § 38 (1988), permit an individual who has held and worked a claim, as provided therein, to assert a location without the necessity of proving local recording and posting, such a claim must still be timely recorded with BLM in accordance with the recordation provisions of sec. 14 of FLPMA, 43 U.S.C. § 1744 (1988), and where the claim has not been duly recorded, it is a nullity. Where placer rights are alleged under 30 U.S.C. § 38 (1988), such rights must be based on an asserted placer location. Placer rights do not, through the working of this statute, ever attach to a lode location.

United States v. Hiram B. Webb, 132 IBLA 152 (Mar. 17, 1995)

A mining claim located when the land was withdrawn from all forms of appropriation under the public land laws, including the mining laws, is null and void ab initio.

Ray L. Verg-In, 133 IBLA 1 (June 28, 1995)

MINING CLAIMS--Continued

LOCATION--Continued

In evaluating descriptions of placer mining claim locations, BLM correctly found that any portions of the claims that extended into lands withdrawn from mineral entry were null and void ab initio.

Jackie Ivankovich et al., 133 IBLA 61 (July 12, 1995)

In evaluating sketch maps provided by a mining claimant that indicated portions of his placer claims extended onto lands withdrawn from mineral entry, BLM correctly found that any portions of the claims that extended onto the withdrawn lands were null and void ab initio.

Marvin Allen, 133 IBLA 94 (July 17, 1995)

BLM properly rejected amended notices of location which sought to enlarge mining claims from 20 acres to 160 acres as such action would be adverse to the initial location and constitute a relocation or a new location of the claims.

Junior L. Dennis, 133 IBLA 329 (Aug. 31, 1995)

MILLSITES

Absent Federal ownership of minerals, land cannot be available for the location of claims under the mining laws, including the location of millsites.

Golden Arc Mining & Refining Inc., 133 IBLA 90 (July 14, 1995)

MINING CLAIMS--Continued

PLACER CLAIMS

In order to satisfy the requirements for a placer location where the location is not made by legal subdivisions in conformity to a survey, the location must be distinctly marked on the ground so that its boundaries can be readily traced and the claim's location notice must include a description of the claim tied to a natural object or permanent monument sufficient to identify the claim. While a locator need not submit a precise description of the position of the claim, the description must generally be adequate to enable the claim to be found and identified by following the recorded description. Where the claimant contends that the actual situs of the claim on the ground differs from the recorded description, the claimant has the burden of showing that the claim was properly located at the position asserted.

While the provisions of 30 U.S.C. § 38 (1988), permit an individual who has held and worked a claim, as provided therein, to assert a location without the necessity of proving local recording and posting, such a claim must still be timely recorded with BLM in accordance with the recordation provisions of sec. 14 of FLPMA, 43 U.S.C. § 1744 (1988), and where the claim has not been duly recorded, it is a nullity. Where placer rights are alleged under 30 U.S.C. § 38 (1988), such rights must be based on an asserted placer location. Placer rights do not, through the working of this statute, ever attach to a lode location.

A placer mining claim for a common variety mineral is properly declared null and void where the mining claimant relies on 30 U.S.C. § 38 (1988), but fails to affirmatively show that he held and worked the claim for the requisite period of time prior to the July 23, 1955, effective date of the Common Varieties Act, 30 U.S.C. § 611 (1988).

United States v. Hiram B. Webb, 132 IBLA 152 (Mar. 17, 1995)

MINING CLAIMS--Continued

PLACER CLAIMS--Continued

A placer mining claim which, at the time of location, partially included land not open to mineral entry, is properly declared null and void ab initio as to such land.

Wayne J. Brewer, 132 IBLA 220 (Apr. 11, 1995)

In evaluating descriptions of placer mining claim locations, BLM correctly found that any portions of the claims that extended into lands withdrawn from mineral entry were null and void ab initio.

Jackie Ivankovich et al., 133 IBLA 61 (July 12, 1995)

In evaluating sketch maps provided by a mining claimant that indicated portions of his placer claims extended onto lands withdrawn from mineral entry, BLM correctly found that any portions of the claims that extended onto the withdrawn lands were null and void ab initio.

Marvin Allen, 133 IBLA 94 (July 17, 1995)

Placer mining claims were invalid because they were located on land licensed for a power project that was closed to mineral entry under sec. 2(a) of the Mining Claims Rights Restoration Act of 1955.

Alan Bruce, 133 IBLA 297 (Aug. 9, 1995)

MINING CLAIMS--Continued

PLACER CLAIMS--Continued

Those portions of mining claims located on lands subject to a material site right-of-way grant issued pursuant to sec. 317 of the Federal Aid Highway Act, 23 U.S.C. § 317 (1988), and a material site right-of-way granted under the Act of Nov. 9, 1921, 23 U.S.C. § 18 (1946), are properly declared null and void ab initio.

Paul Tobeler, 133 IBLA 361 (Sept. 14, 1995)

POSSESSORY RIGHT

While the provisions of 30 U.S.C. § 38 (1988), permit an individual who has held and worked a claim, as provided therein, to assert a location without the necessity of proving local recording and posting, such a claim must still be timely recorded with BLM in accordance with the recordation provisions of sec. 14 of FLPMA, 43 U.S.C. § 1744 (1988), and where the claim has not been duly recorded, it is a nullity. Where placer rights are alleged under 30 U.S.C. § 38 (1988), such rights must be based on an asserted placer location. Placer rights do not, through the working of this statute, ever attach to a lode location.

A placer mining claim for a common variety mineral is properly declared null and void where the mining claimant relies on 30 U.S.C. § 38 (1988), but fails to affirmatively show that he held and worked the claim for the requisite period of time prior to the July 23, 1955, effective date of the Common Varieties Act, 30 U.S.C. § 611 (1988).

United States v. Hiram B. Webb, 132 IBLA 152 (Mar. 17, 1995)

MINING CLAIMS--Continued

RECORDATION OF AFFIDAVIT OF ASSESSMENT WORK OR NOTICE OF INTENTION TO HOLD

A mining claimant who files a satisfactory certification of exemption from payment of rental fees is required to file in the proper BLM office evidence of assessment work performed within the time period prescribed in P.L. 102-381, 106 Stat. 1378-79 (1992), and failure to do so results in a conclusive presumption of abandonment of the mining claim.

Lee Jesse Peterson, 133 IBLA 381 (Sept. 21, 1995)

RELOCATION

Rights acquired under a relocation of a mining claim determined to be abandoned and void pursuant to 43 U.S.C. § 1744 (1988), do not relate back to the date of the location of the original claim but only to the date of relocation.

Wayne J. Brewer, 132 IBLA 220 (Apr. 11, 1995)

RENTAL OR CLAIM MAINTENANCE FEES

Generally

Responsibility for satisfying the rental fee requirement of the Department of the Interior and Related Agencies Appropriations Act for FY 93, P.L. 102-381, 106 Stat. 1378-79 (1992), resides with the owner of the unpatented mining claim, millsite, or tunnel site, as Congress has mandated that failure to make the annual payment of the claim rental fee as required by the Act shall conclusively constitute an abandonment of the unpatented mining claim, millsite, or tunnel site by the claimant. Except for the small-miner exemption, there

MINING CLAIMS--Continued

RENTAL OR CLAIM MAINTENANCE FEES--Continued

Generally--Continued

is no basis for BLM to grant a request for exemption from the rental fee requirements of that Act.

Idaho Mining & Development Co. et al., 132 IBLA 29
(Jan. 25, 1995)

When a check in payment of the mining claim rental fee is tendered by the due date and erroneously dishonored thereafter by the bank upon which it is drawn, the fee will be considered to have been timely tendered when bank officials acknowledge that the bank erred in not honoring the check when it was presented.

Gary L. Carter (On Reconsideration), 132 IBLA 46
(Feb. 10, 1995)

An applicant for a small miner exemption from payment of rental fees under the Act of Oct. 5, 1992, must file a certified statement by Aug. 31, 1993, for each of the assessment years (ending Sept. 1, 1993, and Sept. 1, 1994) for which the exemption is claimed including the information required by regulation at 43 CFR 3833.1-7(d). Where the applicant fails to pay the rental fee for either of the assessment years, the certificate of exemption includes only one year, and the record fails to indicate operations are being conducted pursuant to a notice or plan of operations, the claims are properly deemed abandoned and void.

Edwin L. Evans, 132 IBLA 103 (Feb. 27, 1995)

MINING CLAIMS--Continued

RENTAL OR CLAIM MAINTENANCE FEES--Continued

Generally--Continued

An applicant for a small miner exemption from payment of rental fees under the Act of Oct. 5, 1992, must file a certified statement by Aug. 31, 1993, for each of the assessment years (ending Sept. 1, 1993, and Sept. 1, 1994) for which the exemption is claimed. When the applicant fails to pay the rental fee for either of the assessment years and the certificate of exemption includes only 1 year, the claims are properly deemed abandoned and void.

Richard L. Shreves, 132 IBLA 138 (Mar. 15, 1995)

Under the Interior Department and Related Agencies Appropriations Act of 1993, P.L. 102-381, 106 Stat. 1374, enacted on Oct. 5, 1992, and 43 CFR 3833.1-5 (1993), a claimant who locates a claim on Aug. 27, 1993, and files a notice of location for the claim with BLM on Oct. 6, 1993, in accordance with sec. 314(b) of FLPMA, 43 U.S.C. § 1744(b) (1988), must pay rental fees for both the 1992-93 and the 1993-94 assessment years on the date of filing the notice of location.

Bonnie M. Brown, 132 IBLA 393 (June 14, 1995)

The Department of the Interior and Related Agencies Appropriations Act of 1993, P.L. 102-381, 106 Stat. 1374, approved on Oct. 5, 1992, provides "[t]hat for every unpatented mining claim * * * located after the date of enactment of this Act through September 30, 1994, the locator shall pay \$100 to the Secretary of the Interior or his designee at the time the location notice is recorded with the BLM to hold such claim for the year in which the location was made." 106 Stat. 1379. Except

MINING CLAIMS--Continued

RENTAL OR CLAIM MAINTENANCE FEES--Continued

Generally--Continued

as provided in 43 CFR 3833.0-5(v)(2), rental fees accompanying the filing of location notices for claims that were located on Oct. 27-28, 1992, may not be funded.

Richard A. Magovich, 133 IBLA 114 (July 26, 1995)

Where a mining claimant informs BLM that he does not wish to pay claim maintenance fees to hold certain claims as required by the Omnibus Budget Reconciliation Act of 1933, P.L. 103-66, 107 Stat. 312, 405-06, 30 U.S.C.A. § 28f (1995), a BLM decision declaring the claims null and void is proper when no fees are paid within the statutory time.

Where evidence in the record supports a mining claimant's assertion that he paid the claim maintenance fee within the statutory time, a BLM decision declaring the claim null and void will be reversed, and the claimant is entitled to an opportunity to resubmit the mistakenly refunded fee in order to hold his claim.

Junior L. Dennis, 133 IBLA 329 (Aug. 31, 1995)

A mining claimant who files a satisfactory certification of exemption from payment of rental fees is required to file in the proper BLM office evidence of assessment work performed within the time period prescribed in P.L. 102-381, 106 Stat. 1378-79 (1992), and failure to do so results in a conclusive presumption of abandonment of the mining claim.

Lee Jesse Peterson, 133 IBLA 381 (Sept. 21, 1995)

MINING CLAIMS--Continued

RENTAL OR CLAIM MAINTENANCE FEES--Continued

Generally--Continued

The failure of a mining claimant to file by Aug. 31, 1993, the \$100 claim rental fee or the certificate of exemption from payment of rental fee required by the Department of the Interior and Related Appropriations Act for Fiscal Year 1993, P.L. 102-381, 106 Stat. 1378-79 (1992), constitutes an abandonment of the claim. Similarly, failure to file by Aug. 31, 1994, the \$100 claim maintenance fee or certificate of waiver from payment of maintenance fee required by the Omnibus Budget Reconciliation Act of Aug. 10, 1993, P.L. 103-66, 107 Stat. 312, 405-06, 30 U.S.C.A. § 28f (West 1995) conclusively constitutes a forfeiture of the unpatented mining claim and it is deemed void by operation of law.

Pursuant to the requirements of the Omnibus Budget Reconciliation Act of Aug. 10, 1993, P.L. 103-66, 107 Stat. 312, 405-06, 30 U.S.C.A. § 28f (West 1995), for a mining claim located after passage of the Act, the \$100 claim maintenance fee must be paid at the time the location notice is recorded with the BLM for the existing assessment year, and prior to the commencement of the next assessment year, on or before Aug. 31. Failure to pay the \$100 claim maintenance fee prior to the commencement of each assessment year through 1998 conclusively constitutes a forfeiture and the claim shall be deemed abandoned and void by operation of law.

Benjamin Haimes, 134 IBLA 196 (Nov. 22, 1995)

Small Miner Exemption

Responsibility for satisfying the rental fee requirement of the Department of the Interior and Related Agencies Appropriations Act for FY 93, P.L. 102-381, 106 Stat. 1378-79 (1992), resides with the owner of the unpatented mining claim, millsite, or tunnel site, as Congress has mandated that failure to make the annual

MINING CLAIMS--Continued

RENTAL OR CLAIM MAINTENANCE FEES--Continued

Small Miner Exemption--Continued

payment of the claim rental fee as required by the Act shall conclusively constitute an abandonment of the unpatented mining claim, millsite, or tunnel site by the claimant. Except for the small-miner exemption, there is no basis for BLM to grant a request for exemption from the rental fee requirements of that Act.

Idaho Mining & Development Co. et al., 132 IBLA 29 (Jan. 25, 1995)

An applicant for a small miner exemption from payment of rental fees under the Act of Oct. 5, 1992, must file a certified statement by Aug. 31, 1993, for each of the assessment years (ending Sept. 1, 1993, and Sept. 1, 1994) for which the exemption is claimed including the information required by regulation at 43 CFR 3833.1-7(d). Where the applicant fails to pay the rental fee for either of the assessment years, the certificate of exemption includes only one year, and the record fails to indicate operations are being conducted pursuant to a notice or plan of operations, the claims are properly deemed abandoned and void.

Edwin L. Evans, 132 IBLA 103 (Feb. 27, 1995)

An applicant for a small miner exemption from payment of rental fees under the Act of Oct. 5, 1992, must file a certified statement by Aug. 31, 1993, for each of the assessment years (ending Sept. 1, 1993, and Sept. 1, 1994) for which the exemption is claimed. When the applicant fails to pay the rental fee for either of the assessment years and the certificate of exemption includes only 1 year, the claims are properly deemed abandoned and void.

Richard L. Shreves, 132 IBLA 138 (Mar. 15, 1995)

MINING CLAIMS--Continued

RENTAL OR CLAIM MAINTENANCE FEES--Continued

Small Miner Exemption--Continued

In order to qualify for a small miner exemption from the rental fee requirement of the Department of the Interior and Related Agencies Appropriations Act for FY 1993, a mining claim must meet all conditions set out in 43 CFR 3833.1-6(a) (1993). Where the surface estate of a claim is in Federal ownership and the claim is located on the banks of a Wild and Scenic River Study Area, the claim must be under an approved plan of operations as of Aug. 31, 1993. Where the claimant files a plan of operations for BLM's approval on Aug. 31, 1993, and BLM does not approve it on that date, the claim is not under an approved plan of operations as of the deadline.

Ronald E. Milar, 133 IBLA 214 (Aug. 2, 1995)

A decision denying a small miner's exemption and declaring claims abandoned and void for failure to pay rental fees on the grounds that the claimant owns more than 10 claims is properly vacated where the claimant shows that it filed certifications of exemption for the 1993 and 1994 assessment years on Aug. 26, 1993, listing only 10 claims, and where, at the same time, it recorded its Statement of Annual Assessment Work with the county recorder and filed notice with the FS for those same 10 claims. In those circumstances, the claimant has proven that it dropped two claims in order to meet the requirements of the small miner's exemption.

Washburn Mining Co., 133 IBLA 294 (Aug. 9, 1995)

A mining claimant who files a satisfactory certification of exemption from payment of rental fees is required to file in the proper BLM office evidence of assessment work performed within the time period prescribed in P.L. 102-381, 106 Stat. 1378-79 (1992), and

MINING CLAIMS--Continued

RENTAL OR CLAIM MAINTENANCE FEES--Continued

Small Miner Exemption--Continued

failure to do so results in a conclusive presumption of abandonment of the mining claim.

Lee Jesse Peterson, 133 IBLA 381 (Sept. 21, 1995)

The failure of a mining claimant to file by Aug. 31, 1993, the \$100 claim rental fee or the certificate of exemption from payment of rental fee required by the Department of the Interior and Related Appropriations Act for Fiscal Year 1993, P.L. 102-381, 106 Stat. 1378-79 (1992), constitutes an abandonment of the claim. Similarly, failure to file by Aug. 31, 1994, the \$100 claim maintenance fee or certificate of waiver from payment of maintenance fee required by the Omnibus Budget Reconciliation Act of Aug. 10, 1993, P.L. 103-66, 107 Stat. 312, 405-06, 30 U.S.C.A. § 28f (West 1995) conclusively constitutes a forfeiture of the unpatented mining claim and it is deemed void by operation of law.

Pursuant to the requirements of the Omnibus Budget Reconciliation Act of Aug. 10, 1993, P.L. 103-66, 107 Stat. 312, 405-06, 30 U.S.C.A. § 28f (West 1995), for a mining claim located after passage of the Act, the \$100 claim maintenance fee must be paid at the time the location notice is recorded with the BLM for the existing assessment year, and prior to the commencement of the next assessment year, on or before Aug. 31. Failure to pay the \$100 claim maintenance fee prior to the commencement of each assessment year through 1998 conclusively constitutes a forfeiture and the claim shall be deemed abandoned and void by operation of law.

Benjamin Haimes, 134 IBLA 196 (Nov. 22, 1995)

MINING CLAIMS--Continued

SURFACE USES

BLM properly issues a notice of noncompliance under 43 CFR 3809.3-2 and requires removal of personal property from a mining claim and reclamation of the claim to a condition that existed prior to surface-disturbing activities when a mining claimant constructs a road before filing a notice under 43 CFR 3809.1-3 and causes unnecessary and undue degradation.

Douglas Ditto, 132 IBLA 359 (May 17, 1995)

WITHDRAWN LAND

A placer mining claim which, at the time of location, partially included land not open to mineral entry, is properly declared null and void ab initio as to such land.

Wayne J. Brewer, 132 IBLA 220 (Apr. 11, 1995)

A prima facie case that unpatented placer mining claims were invalid was established by expert testimony from BLM geologists that there had been no discovery of a valuable mineral deposit on the claims, neither when the land claimed was withdrawn from mineral entry nor at the time of hearing on the contest complaint filed by BLM.

United States v. Sandra K. Memmott et al., 132 IBLA 283 (May 2, 1995)

MINING CLAIMS--Continued

WITHDRAWN LAND--Continued

A mining claim located when the land was withdrawn from all forms of appropriation under the public land laws, including the mining laws, is null and void ab initio.

Ray L. Verg-In, 133 IBLA 1 (June 28, 1995)

In evaluating descriptions of placer mining claim locations, BLM correctly found that any portions of the claims that extended into lands withdrawn from mineral entry were null and void ab initio.

Jackie Ivankovich et al., 133 IBLA 61 (July 12, 1995)

In evaluating sketch maps provided by a mining claimant that indicated portions of his placer claims extended onto lands withdrawn from mineral entry, BLM correctly found that any portions of the claims that extended onto the withdrawn lands were null and void ab initio.

Marvin Allen, 133 IBLA 94 (July 17, 1995)

Placer mining claims were invalid because they were located on land licensed for a power project that was closed to mineral entry under sec. 2(a) of the Mining Claims Rights Restoration Act of 1955.

Alan Bruce, 133 IBLA 297 (Aug. 9, 1995)

MINING CLAIMS RIGHTS RESTORATION ACT

Placer mining claims were invalid because they were located on land licensed for a power project that was closed to mineral entry under sec. 2(a) of the Mining Claims Rights Restoration Act of 1955.

Alan Bruce, 133 IBLA 297 (Aug. 9, 1995)

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

(See also Environmental Policy Act)

ENVIRONMENTAL STATEMENTS

The requirement that in preparing an EIS an agency shall "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated," 40 CFR 1502.14(a), does not require an agency to discuss alternatives that would not satisfy the purposes of the proposed action or that are remote and speculative. In an EIS on a proposed right-of-way to construct a dam and reservoir, BLM's review of alternatives was reasonable, and its reasons for having eliminated from detailed study alternatives that could not be implemented in time or about which there was insufficient information available were sufficient and were adequately discussed.

Allen D. Miller, 132 IBLA 270 (Apr. 24, 1995)

The provisions of 40 CFR 1506.1 which prohibit any actions which would adversely affect the environment prior to the issuance of a ROD in connection with a required programmatic impact statement do not apply where the proposed action is covered by an existing program statement.

In re Bryant Eagle Timber Sale, 133 IBLA 25 (June 30, 1995)

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969--Continued

ENVIRONMENTAL STATEMENTS--Continued

A rule of reason applies when reviewing new information regarding a proposed action analyzed in an EIS and considering whether a supplemental EIS is required. A decision to issue a right-of-way for a natural gas pipeline project analyzed in an EIS without preparation of a supplemental EIS will be affirmed when the information generated in a "second look" at the project does not significantly vary from that considered in the EIS in nature or magnitude of the disclosed impact.

Wyoming Independent Producers Ass'n, Independent Petroleum Ass'n of Mountain States, Wyoming Outdoor Council, National Trust for Historic Preservation,
133 IBLA 65 (July 13, 1995)

NATIONAL HISTORIC PRESERVATION ACT

GENERALLY

The NHPA is essentially a procedural, action-forcing statute designed to ensure that cultural resources are identified and considered in the decision-making process. It does not provide for a veto or absolute bar to Federal undertakings which may adversely affect cultural resources. A decision approving issuance of a right-of-way for a natural gas pipeline does not violate the act when the Advisory Council on Historic Preservation has approved and entered into a programmatic agreement with the applicant and other involved agencies establishing requirements for inventory, evaluation, reporting, and review among the parties concerning potentially affected properties, together with provisions for a treatment plan to avoid or mitigate potential impacts.

Wyoming Independent Producers Ass'n, Independent Petroleum Ass'n of Mountain States, Wyoming Outdoor Council, National Trust for Historic Preservation,
133 IBLA 65 (July 13, 1995)

OIL AND GAS LEASES

(See also Mineral Leasing Act, Outer Continental Shelf Lands Act)

GENERALLY

A State Director's review decision upholding a BLM determination that gas vented on a Federal oil and gas lease without prior authorization was avoidably lost, resulting in compensation being due to the United States Government, will be affirmed where the lessee fails to demonstrate by a preponderance of the evidence that the basis for the decision is wrong.

C. C. Co., 132 IBLA 210 (Apr. 4, 1995)

Under 43 CFR 3161.2 and 3162.2(c) BLM may require the operating rights owner to promptly drill and produce a well when it determines such a well is reasonably required in order that the lease may be properly and timely developed and produced in accordance with good economic practices.

Great Western Onshore Inc., 133 IBLA 386 (Sept. 22, 1995)

APPLICATIONS

Generally

It is proper for BLM to reject a noncompetitive oil and gas lease offer for failure to comply with 43 CFR 3103.2-1(a). Each noncompetitive lease offer must be accompanied by full payment of the first year's rental based on the total acreage. An exception to absolute compliance with the letter of this requirement is made if the amount submitted with the offer is deficient by not more than 10 percent or \$200, whichever is less.

Kay Papulak, 132 IBLA 117 (Mar. 1, 1995)

OIL AND GAS LEASES--Continued

APPLICATIONS--Continued

Description

BLM is without jurisdiction to alter, modify, or correct a noncompetitive oil and gas lease offer in order to provide an acceptable description or to construe ambiguities in an offer to make it acceptable. An offer listing land by parcel number and rectangular survey description is properly rejected, where the land is required to be described by survey description and the lands described are all encumbered by issued oil and gas leases.

Gene F. Lang & Co., 132 IBLA 107 (Feb. 28, 1995)

CIVIL ASSESSMENTS AND PENALTIES

An assessment of liquidated damages in the amount of \$250 for failure to abate a minor violation within the time allowed in an INC or any extension thereof under 43 CFR 3163.1(a)(2) is properly affirmed when it appears from the record that the violation was not timely abated.

Craig McGriff Exploration, Inc., 132 IBLA 365 (May 17, 1995)

COMMUNITIZATION AGREEMENTS

Where an Indian oil and gas lease is included in a communitization agreement, and the only producing well in the communitized area is located on the Indian lease, a person with an interest in the

OIL AND GAS LEASES--Continued

COMMUNITIZATION AGREEMENTS--Continued

communitization agreement has standing to challenge a BIA determination that the Indian lease has expired.

McCulliss Resources Co., Inc. v. Acting Phoenix Area Director, Bureau of Indian Affairs, 28 IBIA 268 (Oct. 30, 1995)

DESCRIPTION OF LAND

BLM is without jurisdiction to alter, modify, or correct a noncompetitive oil and gas lease offer in order to provide an acceptable description or to construe ambiguities in an offer to make it acceptable. An offer listing land by parcel number and rectangular survey description is properly rejected, where the land is required to be described by survey description and the lands described are all encumbered by issued oil and gas leases.

Gene F. Lang & Co., 132 IBLA 107 (Feb. 28, 1995)

DRILLING

When BLM grants a suspension of an oil and gas lease during its primary term, the suspension extends the primary term for a period equal to the period of suspension. The lessee will not be entitled to a 2-year extension for drilling over the original expiration date when no drilling operations were in progress on the expiration date of the extended primary lease term.

F. M. Tully, Tully Corp., 132 IBLA 1 (Jan. 19, 1995)

OIL AND GAS LEASES--Continued

DRILLING--Continued

Extension of oil and gas leases at the expiration of their initial 5-year terms was properly denied in the absence of any showing that actual drilling operations were commenced on the leases prior to the end of the lease terms or that there was any other circumstance that would authorize lease extension or suspension.

TNT Oil Co., 134 IBLA 201 (Nov. 22, 1995)

EXPIRATION

When BLM grants a suspension of an oil and gas lease during its primary term, the suspension extends the primary term for a period equal to the period of suspension. The lessee will not be entitled to a 2-year extension for drilling over the original expiration date when no drilling operations were in progress on the expiration date of the extended primary lease term.

F. M. Tully, Tully Corp., 132 IBLA 1 (Jan. 19, 1995)

A lease issued under the IMLA, 25 U.S.C. § 396a-396f (1988), does not expire because of a temporary shut-in caused by a mechanical breakdown or accident, as long as the shut-in does not continue beyond the time reasonably necessary to make repairs and resume production.

Where a lease issued under the IMLA, 25 U.S.C. § 396a-396f (1988), has been shut in due to a mechanical breakdown or accident, and it must be determined whether the operator has made repairs and resumed production within a reasonable time, a "reasonable time" is the

OIL AND GAS LEASES--Continued

EXPIRATION--Continued

amount of time it would take a prudent operator of the same size and type to accomplish these tasks.

Where a lease issued under the IMLA, 25 U.S.C. § 396a-396f (1988), has been shut in due to a mechanical breakdown or accident, and it must be determined whether the operator has made repairs and resumed production within a reasonable time, the determination will be based solely on actions directly related to the making of repairs and resumption of production.

Citation Oilfield Supply & Leasing, Ltd., & Murphy Oil U.S.A., Inc. v. Acting Billings Area Director, Bureau of Indian Affairs, 27 IBIA 210 (Mar. 7, 1995)

Where an Indian oil and gas lease is included in a communitization agreement, and the only producing well in the communitized area is located on the Indian lease, a person with an interest in the communitization agreement has standing to challenge a BIA determination that the Indian lease has expired.

Where the term of an Indian oil and gas lease is for a specified term and "as much longer thereafter as oil and/or gas is produced in paying quantities," the lease does not expire as long as either oil or gas is produced in paying quantities.

McCulliss Resources Co., Inc. v. Acting Phoenix Area Director, Bureau of Indian Affairs, 28 IBIA 268 (Oct. 30, 1995)

OIL AND GAS LEASES--Continued

EXTENSIONS

When BLM grants a suspension of an oil and gas lease during its primary term, the suspension extends the primary term for a period equal to the period of suspension. The lessee will not be entitled to a 2-year extension for drilling over the original expiration date when no drilling operations were in progress on the expiration date of the extended primary lease term.

F. M. Tully, Tully Corp., 132 IBLA 1 (Jan. 19, 1995)

A provision of 30 U.S.C. § 226(m) (1988), required that seven leases partially committed to a unit plan be segregated into separate leases; the resulting leases assumed the indefinite term of the parent leases that were held by production at the time of segregation.

Celsius Energy Co., 132 IBLA 131 (Mar. 7, 1995)

Extension of oil and gas leases at the expiration of their initial 5-year terms was properly denied in the absence of any showing that actual drilling operations were commenced on the leases prior to the end of the lease terms or that there was any other circumstance that would authorize lease extension or suspension.

TNT Oil Co., 134 IBLA 201 (Nov. 22, 1995)

INCIDENTS OF NONCOMPLIANCE

An assessment of liquidated damages in the amount of \$250 for failure to abate a minor violation within the time allowed in an INC or any extension thereof under 43 CFR 3163.1(a)(2) is properly affirmed when it

OIL AND GAS LEASES--Continued

INCIDENTS OF NONCOMPLIANCE--Continued

appears from the record that the violation was not timely abated.

Craig McGriff Exploration, Inc., 132 IBLA 365 (May 17, 1995)

RENTALS

It is proper for BLM to reject a noncompetitive oil and gas lease offer for failure to comply with 43 CFR 3103.2-1(a). Each noncompetitive lease offer must be accompanied by full payment of the first year's rental based on the total acreage. An exception to absolute compliance with the letter of this requirement is made if the amount submitted with the offer is deficient by not more than 10 percent or \$200, whichever is less.

Kay Papulak, 132 IBLA 117 (Mar. 1, 1995)

ROYALTIES

Generally

A State Director's review decision upholding a BLM determination that gas vented on a Federal oil and gas lease without prior authorization was avoidably lost, resulting in compensation being due to the United States Government, will be affirmed where the lessee fails to demonstrate by a preponderance of the evidence that the basis for the decision is wrong.

C. C. Co., 132 IBLA 210 (Apr. 4, 1995)

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Generally--Continued

The regulated ceiling price for natural gas produced from an OCS lease is one of the factors to be considered in valuing the gas for royalty purposes. Gas may be valued at the applicable ceiling price regardless of the fact it was sold at a lesser price where there was no reasonable basis for the lessee to believe the gas did not qualify for that regulated price.

In the absence of a successful production test, gas produced from a reservoir penetrated by a well drilled before July 27, 1976, did not qualify for the higher natural gas ceiling price under sec. 102(d) of the Natural Gas Policy Act when evidence of production capability meeting the requirements of OCS Order No. 4 demonstrated that the reservoir was capable of production in paying quantities or when certain evidence (including sidewall cores and core analysis) indicated the reservoir was commercially producible.

A finding of a reservoir capable of production in paying quantities under sec. 102(d)(2)(B)(ii) of the Natural Gas Policy Act requires evidence of production capability meeting the requirements of OCS Order No. 4. A sidewall core analysis showing a certain stratum to be productive of gas did not establish a reservoir capable of production in paying quantities under OCS Order No. 4 when a contemporaneous electric log for the well showed less than 15 feet of producible sand.

In a case in which the evidence of record establishes that a producing reservoir penetrated by a well prior to July 1976 was reasonably believed by the operator to be commercially producible under sec. 102(d)(2)(B)(iii) of the Natural Gas Policy Act on the basis of side wall cores and core analysis showing the reservoir to be productive of gas, a finding that the reservoir was not discovered before July 1976 based on an induction-electric well log which did not show a minimum of 15 feet of producible sand in one section

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Generally--Continued

will be reversed in the absence of a regulation promulgating this requirement under the language of sec. 102(d)(2)(b)(iii).

Mobil Oil Corp. v. Minerals Management Service, 133 IBLA 300 (Aug. 15, 1995)

A Federal oil and gas lessee's duty to put gas produced from the lease into a marketable condition includes sweetening sour gas by removing hydrogen sulfide, and the costs of such treatment are not deductible from the value of the production for royalty computation purposes no matter who performs the treatment or whether title to the gas passes before the sweetening occurs. Where a contract for the purchase of natural gas produced from Federal leases provides that when sour gas is delivered the price paid will be equal to the price for sweet gas minus a fee for sweetening the sour gas, MMS properly disallows a deduction for the costs of sweetening the gas and values the gas production for royalty purposes at the price for sweet gas.

A MMS demand for additional royalty on production from Federal onshore oil and gas leases is an administrative action not covered by 28 U.S.C. § 2415(a)(1988), which establishes a 6-year time limitation for the commencement of judicial actions for damages by the United States.

Texaco Inc., 134 IBLA 109 (Oct. 12, 1995)

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Generally--Continued

In the absence of a market for gas at the wellhead where production would ordinarily be sold and valued, the Department may authorize the deduction of a transportation allowance from the market value of the gas to reflect the costs incurred in transporting the gas from the leasehold to the first available market.

Absent a determination either that crucial facts were not disclosed or that express regulatory provisions were violated, an order of the U.S. Geological Survey authorizing a transportation allowance is not subject to retroactive reversal.

No deduction for royalty valuation purposes is allowed for transportation costs incurred in moving production from the wellhead to a selling point within that lease nor are the costs of transporting lease production beyond the point of the nearest potential market deductible from value for royalty purposes.

In order for a lessee to be entitled to deduct off-lease transportation costs for royalty purposes, a lessee must request, and the appropriate Departmental officer must approve, a transportation allowance.

Viersen & Cochran, 134 IBLA 155 (Nov. 9, 1995)

Under the "gross proceeds" rule the value of production for royalty purposes shall never be less than the gross proceeds accruing to the lessee from the sale thereof. The sale price received by an affiliate of the lessee in the first arm's-length transaction is properly considered in determining the value of produced gas under the gross proceeds rule.

Under the "marketable condition" rule royalty is due on the gross proceeds accruing to the lessee including payments for the cost of measuring,

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Generally--Continued

gathering, and compressing gas where such services are necessary to place the gas in marketable condition. Deductions from the value of the gas for these expenses are not allowed whether incurred by the lessee or a third party, before or after the initial sale of the gas, when the evidence discloses this is necessary to market the gas.

When gas is valued at a point downstream from the wellhead where the value of production is ordinarily determined, allowances are generally required for expenses (other than those required to put the gas in marketable condition) which add to the value of the gas after production. Valuation of gas properly considers the price received in the first arm's-length sale, but an assessment based on such a valuation will be vacated and remanded when the record shows that it failed to consider transportation costs reflected in the sale price.

Xeno, Inc., 134 IBLA 172 (Nov. 14, 1995)

MMS properly required the lessee of a Federal Indian allottee oil and gas lease to review royalty accounts and to compute and pay additional royalties where an MMS audit demonstrated a systemic underpayment of royalties in 4 of 6 test months.

The 6-year statute of limitations at 28 U.S.C. § 2415(a) (1988), for commencement by the United States of civil actions for damages, does not apply to limit administrative action by the Department. An MMS order requiring recalculation and payment of additional royalties on an Indian allottee oil and gas lease is an administrative action that is not covered by that statute of limitations.

Texaco Exploration and Production, Inc., 134 IBLA 267 (Dec. 1, 1995)

OIL AND GAS LEASES--Continued

ROYALTIES--Continued

Payments

MMS had statutory and regulatory authority to require production of documents concerning crude oil sales contracts made by an affiliate of a Federal oil and gas lessee that were needed to ensure there had been compliance with the gross proceeds rule established by Departmental regulation 30 CFR 206.102(h) (1989).

Shell Oil Co. (On Reconsideration), 132 IBLA 354
(May 11, 1995)

Although MMS policy, as expressed in the Payor Handbook, prohibits cross-lease recoupments on Indian allottee oil and gas leases, such a recoupment may be authorized by this Board where the record contains evidence that (1) MMS has deviated from that policy in the past; (2) the payor has made an overpayment on an Indian allottee lease and circumstances make it impossible to recoup from that lease; and (3) the proposed cross-lease recoupment can be easily accomplished.

Mustang Fuel Corp., 134 IBLA 1 (Sept. 26, 1995)

SUSPENSIONS

When BLM grants a suspension of an oil and gas lease during its primary term, the suspension extends the primary term for a period equal to the period of suspension. The lessee will not be entitled to a 2-year extension for drilling over the original expiration date when no drilling operations were in progress on the expiration date of the extended primary lease term.

F. M. Tully, Tully Corp., 132 IBLA 1 (Jan. 19, 1995)

OIL AND GAS LEASES--Continued

SUSPENSIONS--Continued

Extension of oil and gas leases at the expiration of their initial 5-year terms was properly denied in the absence of any showing that actual drilling operations were commenced on the leases prior to the end of the lease terms or that there was any other circumstance that would authorize lease extension or suspension.

TNT Oil Co., 134 IBLA 201 (Nov. 22, 1995)

TERMINATION

When annual rental for a combined hydrocarbon lease was not timely paid the lease terminated automatically by operation of law; BLM was neither required nor authorized to give a 30-day notice of default before lease termination could occur in such a case.

GNC Energy Corp., 134 IBLA 122 (Nov. 1, 1995)

Where (absent a suspension of operations or production) an oil and gas lessee fails to commence reworking or drilling operations on a well within 60 days after receipt of notice to do so from BLM and fails to demonstrate that there is any well on the leased land capable of production in paying quantities, BLM properly holds that the lease, in its extended term by reason of production, has terminated by operation of law.

Abe M. & George Kalaf (D/B/A Busrx, Inc.), 134 IBLA 133 (Nov. 3, 1995)

OIL AND GAS LEASES--Continued

UNIT AND COOPERATIVE AGREEMENTS

A provision of 30 U.S.C. § 226(m) (1988), required that seven leases partially committed to a unit plan be segregated into separate leases; the resulting leases assumed the indefinite term of the parent leases that were held by production at the time of segregation.

Celsius Energy Co., 132 IBLA 131 (Mar. 7, 1995)

A unit agreement is a contract between the United States and participating parties for joint development and operation of an oil and gas field where substantial amounts of public lands are involved. The owners of any right, title, or interest in the oil and gas deposits to be unitized are regarded, under 43 CFR 3181.3, as proper parties to a proposed agreement and, as such, they must be invited to join the agreement.

Where the unit operator is the lessee of private mineral interests under a lease containing a unitization clause, which allows the lessee at its sole discretion to commit the mineral interest to the unit, the lessee may commit both the mineral working interest and the mineral royalty interest of that lease to the unit.

For purposes of 43 CFR 3165.3, receipt by the unit operator, or its agent, of notice by BLM approving a unit or approving a participating area constitutes constructive service on all parties who have joined the unit and BLM has no obligation independently to notify any working interest or royalty interest owner. Any request for review of such an approval is untimely if it is not filed within 20 business days of the date the approval was received by the unit operator, or its agent.

Where a royalty interest owner has not joined a unit, BLM is not required to notify such an owner of unit or participating area approval. Such a royalty interest owner is not adversely affected by those BLM

OIL AND GAS LEASES--Continued

UNIT AND COOPERATIVE AGREEMENTS--Continued

actions and, thus, has no right to administrative review thereof.

Orvin Froholm, et al., 132 IBLA 301 (May 3, 1995)

WELL CAPABLE OF PRODUCTION

Where (absent a suspension of operations or production) an oil and gas lessee fails to commence reworking or drilling operations on a well within 60 days after receipt of notice to do so from BLM and fails to demonstrate that there is any well on the leased land capable of production in paying quantities, BLM properly holds that the lease, in its extended term by reason of production, has terminated by operation of law.

Abe M. & George Kalaf (D/B/A Busrx, Inc.), 134 IBLA 133 (Nov. 3, 1995)

OREGON AND CALIFORNIA RAILROAD AND RECONVEYED COOS BAY GRANT LANDS

PERMITS

Use of a road on O&C for hauling logs before a permit is issued is a willful trespass under 43 CFR 2800.0-5(v).

Larry Brown & Associates, 132 IBLA 14 (Jan. 19, 1995)

OREGON AND CALIFORNIA RAILROAD AND RECONVEYED COOS
BAY GRANT LANDS--Continued

PERMITS--Continued

It is incumbent upon BLM to ensure that its decision is supported by a rational basis and that such basis is stated in the written decision, as well as being demonstrated in the administrative record accompanying the decision. A decision requiring payment of fees for road use under an O&C logging road right-of-way will be set aside where neither the decision nor the case record provide any support for requiring such payment.

Larry Brown & Associates, 133 IBLA 202 (July 27, 1995)

RIGHTS-OF-WAY

Use of a road on O&C for hauling logs before a permit is issued is a willful trespass under 43 CFR 2800.0-5(v).

Larry Brown & Associates, 132 IBLA 14 (Jan. 19, 1995)

It is incumbent upon BLM to ensure that its decision is supported by a rational basis and that such basis is stated in the written decision, as well as being demonstrated in the administrative record accompanying the decision. A decision requiring payment of fees for road use under an O&C logging road right-of-way will be set aside where neither the decision nor the case record provide any support for requiring such payment.

Larry Brown & Associates, 133 IBLA 202 (July 27, 1995)

OUTER CONTINENTAL SHELF LANDS ACT
(See also Oil & Gas Leases)

OIL AND GAS LEASES

The regulated ceiling price for natural gas produced from an OCS lease is one of the factors to be considered in valuing the gas for royalty purposes. Gas may be valued at the applicable ceiling price regardless of the fact it was sold at a lesser price where there was no reasonable basis for the lessee to believe the gas did not qualify for that regulated price.

In the absence of a successful production test, gas produced from a reservoir penetrated by a well drilled before July 27, 1976, did not qualify for the higher natural gas ceiling price under sec. 102(d) of the Natural Gas Policy Act when evidence of production capability meeting the requirements of OCS Order No. 4 demonstrated that the reservoir was capable of production in paying quantities or when certain evidence (including sidewall cores and core analysis) indicated the reservoir was commercially producible.

A finding of a reservoir capable of production in paying quantities under sec. 102(d)(2)(B)(ii) of the Natural Gas Policy Act requires evidence of production capability meeting the requirements of OCS Order No. 4. A sidewall core analysis showing a certain stratum to be productive of gas did not establish a reservoir capable of production in paying quantities under OCS Order No. 4 when a contemporaneous electric log for the well showed less than 15 feet of producible sand.

In a case in which the evidence of record establishes that a producing reservoir penetrated by a well prior to July 1976 was reasonably believed by the operator to be commercially producible under sec. 102(d)(2)(B)(iii) of the Natural Gas Policy Act on the basis of side wall cores and core analysis showing the reservoir to be productive of gas, a finding that the reservoir was not discovered before July 1976 based on an induction-electric well log which did not show a minimum of 15 feet of producible sand in one section

OUTER CONTINENTAL SHELF LANDS ACT--Continued

OIL AND GAS LEASES--Continued

will be reversed in the absence of a regulation promulgating this requirement under the language of sec. 102(d)(2)(b)(iii).

Mobil Oil Corp. v. Minerals Management Service, 133 IBLA 300 (Aug. 15, 1995)

PAYMENTS

(See also Accounts)

GENERALLY

Where the record is inadequate to determine whether, in fact, appellant met the diligent development requirement under subsequent regulations incorporated in the lease, the matter will be remanded to MMS to compute royalty due.

Cyprus Western Coal Co. (On Judicial Remand), 133 IBLA 52 (July 11, 1995)

POWERSITE LANDS

Placer mining claims were invalid because they were located on land licensed for a power project that was closed to mineral entry under sec. 2(a) of the Mining Claims Rights Restoration Act of 1955.

Alan Bruce, 133 IBLA 297 (Aug. 9, 1995)

PRACTICE BEFORE THE DEPARTMENT
(See also Rules of Practice)

PERSONS QUALIFIED TO PRACTICE

Practice before the IBLA is controlled by 43 CFR 1.3. An appeal brought by a person who does not fall within any of the categories of persons authorized to practice before the Department is subject to dismissal.

Helmut Rohrl, 132 IBLA 279 (Apr. 27, 1995)

PRIVATE EXCHANGES
(See also Exchanges of Land)

PUBLIC INTEREST

Sec. 206(a) of FLPMA, 43 U.S.C. § 1716(a) (1988), authorizes the Secretary of the Interior to exchange public lands, or an interest therein, if the public interest will be well served by such exchange. A protest against an exchange is properly dismissed where the record shows that BLM fully considered in an EA and an addendum thereto the impact of the exchange of certain of the public lands on the grazing operation of the protestant, who held a grazing lease for such lands, and determined that any detrimental effect on the protestant operation was outweighed by the public interest in completing the exchange.

Jesse B. Knopp, 133 IBLA 263 (Aug. 3, 1995)

PUBLIC LANDS

(See also Accretion, Avulsion, Boundaries, Reliction, Surveys of Public Lands)

DISPOSALS OF

Generally

An EA of the effects of leasing public lands under the Recreation and Public Purposes Act, 43 U.S.C. § 869-1 (1988), for use as a shooting range, that failed to adequately consider the effect of shooting noises on nearby homeowners provided an insufficient basis for finding that a lease should issue.

Mary Coles et al., 132 IBLA 398 (June 15, 1995)

SPECIAL USE PERMITS

An application for issuance of a commercial recreation permit to an outfitter offering hiking trips assisted by pack llamas into the public lands was denied in error when BLM found that publication of a magazine article describing such a trip without prior review by BLM was a breach of the terms of a prior permit.

Curt Farmer Pack Llamas, 132 IBLA 42 (Feb. 10, 1995)

A special recreation permit holder is subject to any permit condition or stipulation BLM deems necessary to protect the public interest, and where a commercial river rafting permit holder is on notice that violation of party size restrictions may result in sanctions, BLM may invoke such sanctions upon noncompliance.

A decision issuing a special recreation permit for commercial river rafting on a probationary basis based on party size violations during the previous commercial rafting season will be affirmed on appeal where the case record establishes that the permittee violated the party

PUBLIC LANDS--Continued

SPECIAL USE PERMITS--Continued

size restriction on four occasions during that previous season.

Carrol White, 132 IBLA 141 (Mar. 16, 1995)

BLM properly denies an application for a special recreation use permit for an organized off-road motorcycle race where the record establishes that it would widen an existing trail in a WSA and thereby impair its suitability for designation as wilderness, as such use is forbidden by sec. 603(c) of FLPMA.

Lassen Motorcycle Club, 133 IBLA 104 (July 20, 1995)

Although directed by Curt Farmer Pack Llamas, 132 IBLA 42 (1995), to renew a commercial recreation permit, BLM refused to do so; no justification for this failure to comply with the cited decision having been provided, BLM is directed forthwith to issue a permit to Farmer for a reasonable term consistent with the use sought to be permitted.

Curt Farmer Pack Llamas, 133 IBLA 278 (Aug. 9, 1995)

An application for a land-use permit to allow a survey of Federal land sought to be acquired for use as a land-fill and co-generation plant was properly rejected because the ultimate use proposed was not consistent with the Arizona Strip RMP.

Perfect Ten Industries, 134 IBLA 118 (Nov. 1, 1995)

RAILROAD GRANT LANDS

A decision rejecting an application, pursuant to the Act of Oct. 17, 1978, 49 U.S.C. § 10721(a)(2) (1988), seeking a patent of railroad grant lands for the benefit of the successors-in-interest of a purported innocent purchaser for value from the railroad company prior to Sept. 18, 1940, for failure to provide proof that the land was actually conveyed to the purchaser, will be set aside where the record establishes that the railroad sold the land to the purchaser upon receipt of the full payment price.

Heirs of Joseph Perrin, 132 IBLA 49 (Feb. 14, 1995)

Land which has been patented to a railroad without a reservation of minerals to the United States is not available for the location of mining claims, and a mining claim located on such land after it is so conveyed is null and void ab initio.

Stacy B. Good, 133 IBLA 119 (July 26, 1995)

RECREATION AND PUBLIC PURPOSES ACT

An EA of the effects of leasing public lands under the Recreation and Public Purposes Act, 43 U.S.C. § 869-1 (1988), for use as a shooting range, that failed to adequately consider the effect of shooting noises on nearby homeowners provided an insufficient basis for finding that a lease should issue.

Mary Coles et al., 132 IBLA 398 (June 15, 1995)

REGULATIONS

(See also Administrative Procedure)

FORCE AND EFFECT AS LAW

A clause in a Federal coal lease stating it is issued "pursuant and subject to" all regulations of the Secretary of the Interior "now or hereafter in force" incorporates subsequent regulations relating to diligent development, continuous operations, and advanced royalty requirements.

Cyprus Western Coal Co. (On Judicial Remand), 133 IBLA 52 (July 11, 1995)

INTERPRETATION

In light of OSM's oversight responsibilities, a fair reading of the preamble to OSM's 1988 revision of its 10-day notice regulations dictates that OSM make some type of independent inquiry when the State regulatory authority is precluded by an administrative order from a state administrative body from acting on the possible violation, where that order is based on the violation not existing.

The applicable standard of review to be applied by OSM in determining whether a decision or an order of a state administrative body that a violation does not exist is good cause for failing to correct the violation is the arbitrary, capricious, or abuse of discretion standard, the same standard applicable to OSM review of state regulatory authority actions or responses. Such a decision or order would be arbitrary and capricious if it did not have a proper basis, and it would be an abuse of discretion if the administrative body were acting outside the scope of its authority under the state program in making such a ruling.

Pittsburg & Midway Coal Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 132 IBLA 59 (Feb. 16, 1995)
102 I.D. 1

REGULATIONS--Continued

VALIDITY

A clause in a Federal coal lease stating it is issued "pursuant and subject to" all regulations of the Secretary of the Interior "now or hereafter in force" incorporates subsequent regulations relating to diligent development, continuous operations, and advanced royalty requirements.

Cyprus Western Coal Co. (On Judicial Remand), 133 IBLA 52 (July 11, 1995)

RENT

BLM properly establishes the fair market rental value of a road access right-of-way by utilizing the regulatory rental fee schedule for linear rights-of-way found at 43 CFR 2803.1-2(c), during the course of a periodic adjustment necessary to reflect the current fair market value. Where an appellant fails to point out error in BLM's determination, the rental assessment will be affirmed.

Willard Herzberg, 132 IBLA 384 (June 6, 1995)

RES JUDICATA

Under the doctrine of administrative finality, when a party has had an opportunity to obtain review within the Department and no appeal was taken, the decision may not be reconsidered in later proceedings, except upon a showing of compelling legal or equitable reasons, such as violations of basic rights of the parties or the need to prevent an injustice.

Orvin Froholm, et al., 132 IBLA 301 (May 3, 1995)

Ray L. Verg-In, 133 IBLA 1 (June 28, 1995)

RES JUDICATA--Continued

Where the State of Alaska was not served with a copy of an ALJ's decision overturning a BLM finding that certain lands are mineral-in-character, it is not barred from challenging that finding in its appeal from a subsequent BLM decision granting a Native allotment for those lands. In these circumstances, it is appropriate to refer the matter to the Hearings Division to allow the State the opportunity to do so.

State of Alaska, Dept. of Transportation & Public Facilities (In re Irene Johnson & Jack Craig), 133 IBLA 281 (Aug. 9, 1995)

RIGHTS-OF-WAY

(See also Indians, Reclamation Lands)

GENERALLY

Use of a road on O&C for hauling logs before a permit is issued is a willful trespass under 43 CFR 2800.0-5(v).

Larry Brown & Associates, 132 IBLA 14 (Jan. 19, 1995)

FLPMA grants the Secretary of the Interior discretionary authority to issue rights-of-way. A BLM decision granting a reciprocal grant right-of-way application filed pursuant to sec. 501(a) of FLPMA, 43 U.S.C. § 1761(a) (1988), will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made with due regard for the public interest, and no reason for disturbing the decision is shown on appeal.

John M. Stout, 133 IBLA 321 (Aug. 22, 1995)

RIGHTS-OF-WAY--Continued

GENERALLY--Continued

The burden is on a right-of-way applicant, who challenges a BLM decision denying its application, to demonstrate by a preponderance of the evidence that BLM erred in the collection or evaluation of data supporting rejection and in its conclusions. The applicant's reliance on a BLM engineering report, which concluded that a water-gathering and pipeline project was marginally feasible, does not establish error in the denial, when the denial decision was based not only on the engineering report, but on an environmental analysis prepared by BLM experts, showing that granting the application would adversely affect public land values, including grazing activities, wetlands, and wildlife and its habitat.

Stewart Hayduk, 133 IBLA 346 (Sept. 13, 1995)

A showing that the existence of reasonable alternative access was problematic provided insufficient reason for overturning a BLM decision to reject a road right-of-way application based on findings that alternative access was available and the proposed road would conflict with BLM planning for protection of deer migration routes.

Albert Eugene Rumfelt, 134 IBLA 19 (Oct. 2, 1995)

APPLICATIONS

An application for communications site right-of-way is properly rejected as not in the public interest where BLM determines that an existing Federal right-of-way provides adequate capacity for the applicant's radio transmitting and receiving equipment, and that granting the application would result in unnecessary proliferation of communications equipment and resulting adverse impact on visual resources. BLM is not required to

RIGHTS-OF-WAY--Continued

APPLICATIONS--Continued

issue another right-of-way to foster economic competition or to permit the applicant to avoid rents charged by the current right-of-way holder.

SMR Network, Inc., 131 IBLA 384 (Jan. 9, 1995)

The requirement that in preparing an EIS an agency shall "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated," 40 CFR. 1502.14(a), does not require an agency to discuss alternatives that would not satisfy the purposes of the proposed action or that are remote and speculative. In an EIS on a proposed right-of-way to construct a dam and reservoir, BLM's review of alternatives was reasonable, and its reasons for having eliminated from detailed study alternatives that could not be implemented in time or about which there was insufficient information available were sufficient and were adequately discussed.

When considering applications for rights-of-way privileges, the DOI has no power to determine questions of control and appropriation of water rights as between private parties, as such questions are exclusively matters of state law.

Allen D. Miller, 132 IBLA 270 (Apr. 24, 1995)

When considering an application for a water pipeline right-of-way, the Department has no power to determine questions of control and appropriation of water rights, as between private parties, as such questions are exclusively matters of state law.

Jeff & Patty Walker, 133 IBLA 317 (Aug. 22, 1995)

RIGHTS-OF-WAY--Continued

APPLICATIONS--Continued

FLPMA grants the Secretary of the Interior discretionary authority to issue rights-of-way. A BLM decision granting a reciprocal grant right-of-way application filed pursuant to sec. 501(a) of FLPMA, 43 U.S.C. § 1761(a) (1988), will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made with due regard for the public interest, and no reason for disturbing the decision is shown on appeal.

John M. Stout, 133 IBLA 321 (Aug. 22, 1995)

A BLM decision rejecting a right-of-way application for a water-gathering and pipeline project, filed pursuant to sec. 501 of FLPMA, 43 U.S.C. § 1761 (1988), will be affirmed where the record shows the decision to be a reasoned analysis of the facts involved, made with due regard for the public interest.

Stewart Hayduk, 133 IBLA 346 (Sept. 13, 1995)

A showing that the existence of reasonable alternative access was problematic provided insufficient reason for overturning a BLM decision to reject a road right-of-way application based on findings that alternative access was available and the proposed road would conflict with BLM planning for protection of deer migration routes.

Albert Eugene Rumfelt, 134 IBLA 19 (Oct. 2, 1995)

RIGHTS-OF-WAY--Continued

APPRAISALS

Generally, the proper appraisal method for determining the fair market rental value of nonlinear rights-of-way, including communication sites, is the comparable lease method of appraisal. An appraisal of fair market rental value for a communication site right-of-way will be affirmed on appeal if an appellant fails to show error in the appraisal methods used or fails to show by a preponderance of the evidence that the charges are in excess of the fair market rental value.

Where an appraisal is undertaken for the purpose of determining the initial rental for a communication site right-of-way which has already issued, the fair market value must be calculated as of the date of the issuance of the right-of-way and not as of the date of the appraisal.

Oroville-Wyandotte Irrigation District, 131 IBLA 379
(Jan. 9, 1995)

BLM properly requires the holder of a communication site right-of-way to pay rental charges, in addition to those originally estimated at the time of issuance of the right-of-way grant, based upon an appraisal of the fair market rental value of the right-of-way grant. A delay of over 2 years between issuance of the right-of-way grant and notification to the holder of the appraised rental value does not relieve the right-of-way holder of the obligation to pay the appraised rental charges.

Generally, the proper appraisal method for determining the fair market rental value of nonlinear rights-of-way, including communication sites, is the comparable lease method of appraisal. An appraisal of a right-of-way grant will not be set aside unless BLM has erred in applying the proper criteria to calculate the fair market rental value or the appellant demonstrates that the resulting charges are excessive. Absent a showing of error in the appraisal methods utilized, an appellant is normally required to submit another appraisal in

RIGHTS-OF-WAY--Continued

APPRAISALS--Continued

order to present sufficiently convincing evidence that the rental charges are excessive.

Michael D. Dahmer, 132 IBLA 17 (Jan. 23, 1995)

BLM properly establishes the fair market rental value of a road access right-of-way by utilizing the regulatory rental fee schedule for linear rights-of-way found at 43 CFR 2803.1-2(c), during the course of a periodic adjustment necessary to reflect the current fair market value. Where an appellant fails to point out error in BLM's determination, the rental assessment will be affirmed.

Willard Herzberg, 132 IBLA 384 (June 6, 1995)

BLM's determination of the fair market rental for a right-of-way for a hydroelectric project will be affirmed where the holder fails to demonstrate, by a preponderance of the evidence, that BLM's appraisal methodology (assessing a percentage of the gross income received from the sale of electricity generated by the project) was improper; that it used inappropriate data, erred in its calculations, or otherwise arrived at a rental that deviated from fair market value; or that the rental should be reduced or waived since the holder provides a valuable benefit to the public.

Lateral 10 Ventures Limited Partnership, 133 IBLA 268 (Aug. 7, 1995)

RIGHTS-OF-WAY--Continued

APPRAISALS--Continued

In order to expedite issuance of rights-of-way, the regulations authorize BLM to estimate rental and collect an advance deposit subject to adjustment upon completion of an appraisal of the fair market rental value. When the estimated rental is charged on a calendar year basis, the annual estimated rental is properly prorated on a monthly basis for the first (partial) year of the right-of-way.

An appeal of the rental charge for a communications site right-of-way based on a preliminary rental estimate by BLM under 43 CFR 2803.1-2(c)(3)(ii) is premature prior to an appraisal of the fair market rental value and is therefore properly dismissed.

Pinnacles Telephone Co., 134 IBLA 53 (Oct. 4, 1995)

CONDITIONS AND LIMITATIONS

In approving an application for the assignment of a right-of-way issued under the FLPMA, 43 U.S.C. §§ 1761-1771 (1988), BLM may add a condition requiring that a pipeline constructed on the right-of-way be operated as a common carrier.

In approving an application for the assignment of a right-of-way issued under the FLPMA, 43 U.S.C. §§ 1761-1771 (1988), it is beyond BLM's authority to add provisions regarding rates to be charged for use of a pipeline that has been held to be a common carrier because that is a matter that has been delegated to the Interstate Commerce Commission.

Ashley Creek Phosphate Co., John D. Archer, 134 IBLA 206 (Nov. 29, 1995) 102 I.D. 133

RIGHTS-OF-WAY--Continued

FEDERAL HIGHWAY ACT

A materials site right-of-way will be considered a valid existing right within the meaning of sec. 905(a)(1) of ANILCA, and thus not subject to legislative approval, where the land was mineral-in-character during the period of use and occupancy by the Native prior to the creation of the right-of-way, and thus not available for allotment.

State of Alaska, Dept. of Transportation & Public Facilities (In re Irene Johnson & Jack Craig), 133 IBLA 281 (Aug. 9, 1995)

Those portions of mining claims located on lands subject to a material site right-of-way grant issued pursuant to sec. 317 of the Federal Aid Highway Act, 23 U.S.C. § 317 (1988), and a material site right-of-way granted under the Act of Nov. 9, 1921, 23 U.S.C. § 18 (1946), are properly declared null and void ab initio.

Paul Tobeler, 133 IBLA 361 (Sept. 14, 1995)

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976

The requirement that in preparing an EIS an agency shall "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated," 40 CFR 1502.14(a), does not require an agency to discuss alternatives that would not satisfy the purposes of the proposed action or that are remote and speculative. In an EIS on a proposed right-of-way to construct a dam and reservoir, BLM's review of alternatives was reasonable, and its reasons for having eliminated from detailed study alternatives that could not be implemented in time

RIGHTS-OF-WAY--Continued

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

or about which there was insufficient information available were sufficient and were adequately discussed.

When considering applications for rights-of-way privileges, the DOI has no power to determine questions of control and appropriation of water rights as between private parties, as such questions are exclusively matters of state law.

A BLM decision exercising the Secretary's discretion to grant a right-of-way will be affirmed on appeal where the record demonstrates that it was based upon a reasoned analysis of all relevant factors, was made with due regard for the public interest, and sufficient reasons for disturbing the decision are not shown.

Allen D. Miller, 132 IBLA 270 (Apr. 24, 1995)

BLM properly establishes the fair market rental value of a road access right-of-way by utilizing the regulatory rental fee schedule for linear rights-of-way found at 43 CFR 2803.1-2(c), during the course of a periodic adjustment necessary to reflect the current fair market value. Where an appellant fails to point out error in BLM's determination, the rental assessment will be affirmed.

Willard Herzberg, 132 IBLA 384 (June 6, 1995)

When a BLM RMP provides that major utility and transportation systems will be located to make use of existing corridors whenever possible but also provides that most of the area (excepting specified avoidance areas) will be open for location of major utility systems, a decision approving a right-of-way for a buried natural gas pipeline will not be reversed as inconsistent with the land use plan if the right-of-way does not cross an avoidance area, and BLM reasonably concludes that a longer alternative route paralleling

RIGHTS-OF-WAY--Continued

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

existing rights-of-way would not be appropriate because of the added cost and disturbance.

Wyoming Independent Producers Ass'n, Independent Petroleum Ass'n of Mountain States, Wyoming Outdoor Council, National Trust for Historic Preservation,
133 IBLA 65 (July 13, 1995)

When considering an application for a water pipeline right-of-way, the Department has no power to determine questions of control and appropriation of water rights, as between private parties, as such questions are exclusively matters of state law.

Jeff & Patty Walker, 133 IBLA 317 (Aug. 22, 1995)

FLPMA grants the Secretary of the Interior discretionary authority to issue rights-of-way. A BLM decision granting a reciprocal grant right-of-way application filed pursuant to sec. 501(a) of FLPMA, 43 U.S.C. § 1761(a) (1988), will be affirmed when the record shows the decision to be a reasoned analysis of the factors involved, made with due regard for the public interest, and no reason for disturbing the decision is shown on appeal.

John M. Stout, 133 IBLA 321 (Aug. 22, 1995)

A BLM decision rejecting a right-of-way application for a water-gathering and pipeline project, filed pursuant to sec. 501 of FLPMA, 43 U.S.C. § 1761 (1988), will be affirmed where the record shows the decision to be a reasoned analysis of the facts involved, made with due regard for the public interest.

The burden is on a right-of-way applicant, who challenges a BLM decision denying its application, to demonstrate by a preponderance of the evidence that BLM

RIGHTS-OF-WAY--Continued

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976--Continued

erred in the collection or evaluation of data supporting rejection and in its conclusions. The applicant's reliance on a BLM engineering report, which concluded that a water-gathering and pipeline project was marginally feasible, does not establish error in the denial, when the denial decision was based not only on the engineering report, but on an environmental analysis prepared by BLM experts, showing that granting the application would adversely affect public land values, including grazing activities, wetlands, and wildlife and its habitat.

Stewart Hayduk, 133 IBLA 346 (Sept. 13, 1995)

In approving an application for the assignment of a right-of-way issued under the FLPMA, 43 U.S.C. §§ 1761-1771 (1988), BLM may add a condition requiring that a pipeline constructed on the right-of-way be operated as a common carrier.

In approving an application for the assignment of a right-of-way issued under the FLPMA, 43 U.S.C. §§ 1761-1771 (1988), it is beyond BLM's authority to add provisions regarding rates to be charged for use of a pipeline that has been held to be a common carrier because that is a matter that has been delegated to the Interstate Commerce Commission.

Ashley Creek Phosphate Co., John D. Archer, 134 IBLA 206 (Nov. 29, 1995) 102 I.D. 133

OIL AND GAS PIPELINES

Departmental regulation 43 CFR 4.410 provides a right of appeal to the Board to any party adversely affected by a decision of an officer of BLM. When BLM issues a decision approving a right-of-way across public lands for segments of a natural gas pipeline that would transport gas from Canada, based on an EIS prepared by

RIGHTS-OF-WAY--Continued

OIL AND GAS PIPELINES--Continued

FERC as the "lead agency," and the party appealing BLM's decision alleges injury arising from the failure of the EIS to consider the socioeconomic effects of importing gas from Canada, that party will be deemed to have been adversely affected by the FERC decision rather than that of BLM, and the appeal is properly dismissed.

When the FERC issues a certificate of convenience and necessity for a natural gas pipeline that crossing public land and a petition for judicial review of the certificate is filed with the appropriate U.S. Court of Appeals, the exclusive judicial review provision of 15 U.S.C. § 717r (1988), does not deprive the Secretary of the Interior of his authority to review a decision of a subordinate approving a right-of-way for the pipeline. A motion to dismiss an appeal to the Board of Land Appeals (which exercises the Secretary's delegated administrative review authority) claiming the appeal to be a collateral attack on a FERC certificate authorizing the pipeline is properly denied.

A right-of-way for an oil and gas transportation pipeline is properly issued under sec. 28 of the Mineral Lands Leasing Act, 30 U.S.C. § 185 (1988). Although sec. 28 requires utilization of rights-of-way in common to the extent "practical," a decision by BLM in its discretion to issue a right-of-way along a route which parallels existing rights-of-way to a lesser extent than another alternative will be affirmed when the record supports a finding that this was not a practical alternative.

When a BLM RMP provides that major utility and transportation systems will be located to make use of existing corridors whenever possible but also provides that most of the area (excepting specified avoidance areas) will be open for location of major utility systems, a decision approving a right-of-way for a buried natural gas pipeline will not be reversed as inconsistent with the land use plan if the right-of-way does not cross an avoidance area, and BLM reasonably concludes that a longer alternative route paralleling

RIGHTS-OF-WAY--Continued

OIL AND GAS PIPELINES--Continued

existing rights-of-way would not be appropriate because of the added cost and disturbance.

Wyoming Independent Producers Ass'n, Independent Petroleum Ass'n of Mountain States, Wyoming Outdoor Council, National Trust for Historic Preservation,
133 IBLA 65 (July 13, 1995)

REVISED STATUTES SEC. 2477

Reconsideration of a Board decision dismissing an appeal for lack of standing to appeal an administrative determination by BLM that a road is a R.S. 2477 right-of-way will be granted and the decision vacated where it is established that the determination was made in connection with a proposed road improvement project which would allegedly adversely affect public lands and resources.

Southern Utah Wilderness Alliance (On Reconsideration),
132 IBLA 91 (Feb. 21, 1995)

RULES OF PRACTICE

(See also Administrative Procedure, Appeals, Contests & Protests, Contracts, Hearings, Indian Probate, Practice Before the Department)

GENERALLY

Where the Board of Land Appeals, based on the record before it, orders the issuance of a contest complaint, the record which was before the Board should be offered and admitted into evidence at any

RULES OF PRACTICE--Continued

GENERALLY--Continued

subsequent hearing unless otherwise expressly provided by the Board.

Where the Government files a contest complaint against a Native allotment application, the Government bears the burden of presenting a prima facie case establishing that evidence of record does not affirmatively show compliance with all of the statutory and regulatory requirements necessary to obtain title to a Native allotment under the Native Allotment Act of 1906.

United States v. Angeline Galbraith, 134 IBLA 75
(Oct. 12, 1995) 102 I.D. 116

APPEALS

Generally

Where the Solicitor determines that the Department is without authority to convey certain lands to Alaska villages, and that determination is adopted by the Assistant Secretary for Land and Minerals Management and declared to be the final action of the Department, under Blue Star, Inc., 41 IBLA 333 (1979), the Board of Land Appeals is without jurisdiction to review the matter.

Cook Inlet Region, Inc., 132 IBLA 186 (Mar. 28, 1995)

An administrative decision is properly set aside and remanded if it is not supported by a case record providing the Board the information necessary for an objective, independent review of the basis for decision.

Great Western Onshore Inc., 133 IBLA 386 (Sept. 22, 1995)

RULES OF PRACTICE--Continued

APPEALS--Continued

Generally--Continued

The voluntary decision of a contestee not to proceed but rather to challenge a ruling by an ALJ that a prima facie case has been presented at a hearing constitutes a waiver of the contestee's right to present evidence on his or her own behalf. Should the appeal of the ruling be unsuccessful, the contestee will not ordinarily be afforded an additional hearing.

Where, at the close of the Government's case-in-chief, a contestee moves for dismissal of the complaint on the ground that a prima facie showing has not been made, it is error for an ALJ to take the motion under advisement and direct the contestee to proceed with its presentation.

United States v. Angeline Galbraith, 134 IBLA 75
(Oct. 12, 1995) 102 I.D. 116

Board of Land Appeals

Under 43 CFR 4.477, the ALJ may either place his or her decision into full force and effect or revoke the full force and effect of a BLM decision only in the context of issuing a final decision on the merits of the pending appeal.

Filippini Ranching Co. & Paris Ranch v. Bureau of Land Management, 133 IBLA 19 (June 30, 1995)

RULES OF PRACTICE--Continued

APPEALS--Continued

Board of Land Appeals--Continued

Although directed by Curt Farmer Pack Llamas, 132 IBLA 42 (1995), to renew a commercial recreation permit, BLM refused to do so; no justification for this failure to comply with the cited decision having been provided, BLM is directed forthwith to issue a permit to Farmer for a reasonable term consistent with the use sought to be permitted.

Curt Farmer Pack Llamas, 133 IBLA 278 (Aug. 9, 1995)

Burden of Proof

One challenging a resurvey after the official filing of the plat of resurvey has the burden of establishing by a preponderance of the evidence that the resurvey was fraudulent or grossly erroneous.

Kendal Stewart, 132 IBLA 190 (Mar. 28, 1995)

A party appealing under the regulations at 43.CFR 1280-1286 an OSM decision to grant a Phase I bond release with regard to a reclaimed area bears the burden of showing that OSM erred.

William H. Pullen, Jr., et al., 132 IBLA 224 (Apr. 13, 1995)

An interested party challenging acceptance of a plat of a dependent resurvey must establish by a preponderance of the evidence that the resurvey is not an accurate retracement and reestablishment of the lines of the original survey.

Thom Seal et al., 132 IBLA 244 (Apr. 17, 1995)

RULES OF PRACTICE--Continued

APPEALS--Continued

Burden of Proof--Continued

The burden is on a right-of-way applicant, who challenges a BLM decision denying its application, to demonstrate by a preponderance of the evidence that BLM erred in the collection or evaluation of data supporting rejection and in its conclusions. The applicant's reliance on a BLM engineering report, which concluded that a water-gathering and pipeline project was marginally feasible, does not establish error in the denial, when the denial decision was based not only on the engineering report, but on an environmental analysis prepared by BLM experts, showing that granting the application would adversely affect public land values, including grazing activities, wetlands, and wildlife and its habitat.

Stewart Hayduk, 133 IBLA 346 (Sept. 13, 1995)

Dismissal

Practice before the IBLA is controlled by 43 CFR 1.3. An appeal brought by a person who does not fall within any of the categories of persons authorized to practice before the Department is subject to dismissal.

Pursuant to applicable Departmental regulations, an appeal is subject to summary dismissal where a SOR in support of the appeal is not included in the notice of appeal and is not filed within 30 days after the filing of a notice of appeal. Submissions filed in connection with an appeal which do not affirmatively point out in what respect the decision appealed from is in error do not meet the requirements of the Department's rules of practice and such an appeal is also subject to summary dismissal.

Helmut Rohrl, 132 IBLA 279 (Apr. 27, 1995)

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

For purposes of 43 CFR 3165.3, receipt by the unit operator, or its agent, of notice by BLM approving a unit or approving a participating area constitutes constructive service on all parties who have joined the unit and BLM has no obligation independently to notify any working interest or royalty interest owner. Any request for review of such an approval is untimely if it is not filed within 20 business days of the date the approval was received by the unit operator, or its agent.

Where a royalty interest owner has not joined a unit, BLM is not required to notify such an owner of unit or participating area approval. Such a royalty interest owner is not adversely affected by those BLM actions and, thus, has no right to administrative review thereof.

Orvin Froholm, et al., 132 IBLA 301 (May 3, 1995)

Departmental regulation 43 CFR 4.410 provides a right of appeal to the Board to any party adversely affected by a decision of an officer of BLM. When BLM issues a decision approving a right-of-way across public lands for segments of a natural gas pipeline that would transport gas from Canada, based on an EIS prepared by FERC as the "lead agency," and the party appealing BLM's decision alleges injury arising from the failure of the EIS to consider the socioeconomic effects of importing gas from Canada, that party will be deemed to have been adversely affected by the FERC decision rather than that of BLM, and the appeal is properly dismissed.

When the FERC issues a certificate of convenience and necessity for a natural gas pipeline that crossing public land and a petition for judicial review of the certificate is filed with the appropriate U.S. Court of Appeals, the exclusive judicial review provision of 15 U.S.C. § 717r (1988), does not deprive the Secretary

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

of the Interior of his authority to review a decision of a subordinate approving a right-of-way for the pipeline. A motion to dismiss an appeal to the Board of Land Appeals (which exercises the Secretary's delegated administrative review authority) claiming the appeal to be a collateral attack on a FERC certificate authorizing the pipeline is properly denied.

BLM's failure to seek designation of an area as a historical landscape does not, by itself, constitute an "identifiable decision" subject to appeal under 43 CFR 4.410. To the extent that designation of an historical landscape would require its proposal as an area of critical environmental concern, the proposal must be made through BLM's land-use planning process. The Board does not have jurisdiction to consider appeals from the approval or amendment of a RMP and cannot gain jurisdiction until action is taken to implement the plan.

Wyoming Independent Producers Ass'n, Independent Petroleum Ass'n of Mountain States, Wyoming Outdoor Council, National Trust for Historic Preservation,
133 IBLA 65 (July 13, 1995)

An appeal will be dismissed as untimely when the record fails to establish that the Notice of Appeal was transmitted within the 30-day period established by 43 CFR 4.411(a).

Golden Arc Mining & Refining Inc., 133 IBLA 90 (July 14, 1995)

RULES OF PRACTICE--Continued

APPEALS--Continued

Dismissal--Continued

The timely filing of a notice of appeal is jurisdictional and an appeal filed more than 30 days after receipt of the decision under appeal is properly dismissed. When the 30th day falls on a day when the office is closed, the appeal period is extended to the close of the next day on which the office is open.

Commission for the Preservation of Wild Horses, et al.,
133 IBLA 97 (July 18, 1995)

An appeal supported by a SOR which does not meet the Department's rules of practice may be dismissed. However, dismissal is not mandatory and each case will be considered individually.

Mustang Fuel Corp., 134 IBLA 1 (Sept. 26, 1995)

An appeal of the rental charge for a communications site right-of-way based on a preliminary rental estimate by BLM under 43 CFR 2803.1-2(c)(3)(ii) is premature prior to an appraisal of the fair market rental value and is therefore properly dismissed.

Pinnacles Telephone Co., 134 IBLA 53 (Oct. 4, 1995)

Effect_of

Under the doctrine of administrative finality, when a party has had an opportunity to obtain review within the Department and no appeal was taken, the decision may not be reconsidered in later proceedings, except upon a showing of compelling legal or equitable reasons, such

RULES OF PRACTICE--Continued

APPEALS--Continued

Effect_of--Continued

as violations of basic rights of the parties or the need to prevent an injustice.

Orvin Froholm, et al., 132 IBLA 301 (May 3, 1995)

Ray L. Verg-In, 133 IBLA 1 (June 28, 1995)

Under 43 CFR 4.477, the ALJ may either place his or her decision into full force and effect or revoke the full force and effect of a BLM decision only in the context of issuing a final decision on the merits of the pending appeal.

Filippini Ranching Co. & Paris Ranch v. Bureau of Land Management, 133 IBLA 19 (June 30, 1995)

The filing of a notice of appeal vests exclusive authority over the matter under appeal with the Board of Land Appeals, and BLM's authority is not restored until the Board takes action disposing of the appeal.

George L. Cramer, 134 IBLA 186 (Nov. 20, 1995)

Failure to Appeal

Where the State of Alaska was not served with a copy of an ALJ's decision overturning a BLM finding that certain lands are mineral-in-character, it is not barred from challenging that finding in its appeal from a subsequent BLM decision granting a Native allotment for those lands. In these circumstances, it is appropriate

RULES OF PRACTICE--Continued

APPEALS--Continued

Failure to Appeal--Continued

to refer the matter to the Hearings Division to allow the State the opportunity to do so.

State of Alaska, Dept. of Transportation & Public Facilities (In re Irene Johnson & Jack Craig), 133 IBLA 281 (Aug. 9, 1995)

Hearings

An ALJ is not limited to deciding issues of fact under 43 CFR 4.1286. An ALJ is expected to receive evidence on and consider all relevant matters and to address the legal and factual issues necessary to resolve the dispute between the parties. If the Board wishes to limit the scope of a hearing, it may so state in the order of referral.

James Spur, Inc., et al. v. Office of Surface Mining & Enforcement, 133 IBLA 123 (July 26, 1995) 102 I.D. 43

Where the Board of Land Appeals, based on the record before it, orders the issuance of a contest complaint, the record which was before the Board should be offered and admitted into evidence at any subsequent hearing unless otherwise expressly provided by the Board.

United States v. Angeline Galbraith, 134 IBLA 75 (Oct. 12, 1995) 102 I.D. 116

RULES OF PRACTICE--Continued

APPEALS--Continued

Jurisdiction

The Board has no jurisdiction over appeals from the approval or amendment of an RMP, but only over actions implementing such a plan. 43 CFR 1610.5-2; 43 CFR 1610.5-3. A "Planning Update" distributed by a BLM resource area manager which was relative to the resource management planning process and was preliminary to issuance of a final RMP is not subject to administrative review by the Board of Land Appeals because actions described therein are not actions implementing an RMP or some portion thereof. 43 CFR 1610.5-3(b).

Southern Utah Wilderness Alliance, American Rivers,
132 IBLA 255 (Apr. 19, 1995)

Departmental regulation 43 CFR 4.410 provides a right of appeal to the Board to any party adversely affected by a decision of an officer of BLM. When BLM issues a decision approving a right-of-way across public lands for segments of a natural gas pipeline that would transport gas from Canada, based on an EIS prepared by FERC as the "lead agency," and the party appealing BLM's decision alleges injury arising from the failure of the EIS to consider the socioeconomic effects of importing gas from Canada, that party will be deemed to have been adversely affected by the FERC decision rather than that of BLM, and the appeal is properly dismissed.

When the FERC issues a certificate of convenience and necessity for a natural gas pipeline that crossing public land and a petition for judicial review of the certificate is filed with the appropriate U.S. Court of Appeals, the exclusive judicial review provision of 15 U.S.C. § 717r (1988), does not deprive the Secretary of the Interior of his authority to review a decision of a subordinate approving a right-of-way for the pipeline. A motion to dismiss an appeal to the Board of Land Appeals (which exercises the Secretary's delegated administrative review authority) claiming the appeal to

RULES OF PRACTICE--Continued

APPEALS--Continued

Jurisdiction--Continued

be a collateral attack on a FERC certificate authorizing the pipeline is properly denied.

Wyoming Independent Producers Ass'n, Independent Petroleum Ass'n of Mountain States, Wyoming Outdoor Council, National Trust for Historic Preservation, 133 IBLA 65 (July 13, 1995)

Although the Board of Land Appeals has no jurisdiction to review appeals of decisions to approve or amend a RMP, approval of an activity plan designed to implement a RMP is appealable to the Board.

Petroleum Ass'n of Wyoming, et al., 133 IBLA 337 (Sept. 7, 1995)

Motions

When the parties both sought summary judgment on the question of the validity of the Government's contract option exercise; both engaged in discovery, including depositions, with which they supplemented the documentary record; credibility assessments were unnecessary; and the material facts upon which the Board relied in resolving the essentially legal issue were undisputed or uncontroverted, summary judgment was warranted.

Appeals of TECOM, Inc., IBCA-2970 a-1 (Mar. 21, 1995)
102 I.D. 17

RULES OF PRACTICE--Continued

APPEALS--Continued

Motions--Continued

The Board denied applicant's motion that material in support of its EAJA submission be placed under seal for lack of any demonstration of good cause to override the public's common law right of access to Board records.

The Board deferred ruling upon applicant's motion for oral argument, pending receipt of its modified application and BOR's response, and to encourage settlement negotiations.

EAJA Application of Hardrives, Inc., IBCA-3283-F
(Sept. 8, 1995) 102 I.D. 81

Summary judgment is inappropriate, in a liquidated damages appeal, when memoranda and affidavits of the parties, filed in support of motions, show substantial disagreement on who was responsible for delay in performance; the nature and scope of Government's loss; and the justification for assessment.

Appeals of Gardner Zemke Co., IBCA-3261 (Sept. 11, 1995)
102 I.D. 103

Reconsideration

Reconsideration of a Board decision dismissing an appeal for lack of standing to appeal an administrative determination by BLM that a road is a R.S. 2477 right-of-way will be granted and the decision vacated where it is established that the determination was made in connection with a proposed road improvement project which

RULES OF PRACTICE--Continued

APPEALS--Continued

Reconsideration--Continued

would allegedly adversely affect public lands and resources.

Southern Utah Wilderness Alliance (On Reconsideration),
132 IBLA 91 (Feb. 21, 1995)

Standing to Appeal

Although Departmental regulation 43 CFR 4.412(b) requires a party filing an appeal from a decision involving a selection application under ANCSA to file a statement of standing within 30 days after filing its notice of appeal, the Board's discretionary authority to dismiss such an appeal for failure to file a statement of standing will not be exercised when the property interest on which a party claims standing is identified in the SOR and there is no showing that a procedural deficiency has prejudiced a party.

In an appeal by the State of Alaska from a decision denying reservation of public easements in a historical place conveyance to a Native corporation, the State's allegation that the easements are needed to assure reasonable access to State-owned land below the ordinary high water line indicates a property interest affected by BLM's decision that provides a basis for standing to appeal.

State of Alaska, 132 IBLA 197 (Mar. 29, 1995)

RULES OF PRACTICE--Continued

APPEALS--Continued

Standing to Appeal--Continued

Departmental regulation 43 CFR 4.410 provides a right of appeal to the Board to any party adversely affected by a decision of an officer of BLM. When BLM issues a decision approving a right-of-way across public lands for segments of a natural gas pipeline that would transport gas from Canada, based on an EIS prepared by FERC as the "lead agency," and the party appealing BLM's decision alleges injury arising from the failure of the EIS to consider the socioeconomic effects of importing gas from Canada, that party will be deemed to have been adversely affected by the FERC decision rather than that of BLM, and the appeal is properly dismissed.

Wyoming Independent Producers Ass'n, Independent Petroleum Ass'n of Mountain States, Wyoming Outdoor Council, National Trust for Historic Preservation,
133 IBLA 65 (July 13, 1995)

A party will not be accorded standing to appeal from a BLM decision where it does not demonstrate that it has a legally cognizable interest which has been adversely affected by that decision. Where a party appeals a BLM RQD approving a habitat management plan that, by itself, has no adverse consequences, actual or threatened, because it does not finally implement the challenged approved alternatives but rather identifies the additional actions necessary to implement the plan, including the opportunities for affected parties to participate in and appeal from the final implementation actions, the party lacks standing to appeal because it has not yet been adversely affected by BLM's decision, and its appeal is properly dismissed.

Petroleum Ass'n of Wyoming, et al., 133 IBLA 337
(Sept. 7, 1995)

RULES OF PRACTICE--Continued

APPEALS--Continued

Standing to Appeal--Continued

A request for stay is denied and the underlying appeal is dismissed because an association seeking to appeal a BLM decision to burn woodlands was not a "party to a case" under 43 CFR 4.410(a) and therefore lacked standing to appeal after officers of the association declined to participate in BLM planning prior to issuance of a decision although invited to do so.

Committee for Idaho's High Desert, 133 IBLA 378
(Sept. 19, 1995)

Statement of Reasons

Pursuant to applicable Departmental regulations, an appeal is subject to summary dismissal where a SOR in support of the appeal is not included in the notice of appeal and is not filed within 30 days after the filing of a notice of appeal. Submissions filed in connection with an appeal which do not affirmatively point out in what respect the decision appealed from is in error do not meet the requirements of the Department's rules of practice and such an appeal is also subject to summary dismissal.

Helmut Rohrl, 132 IBLA 279 (Apr. 27, 1995)

Where a decision clarifying a controlling issue of law issues during the pendency of an appeal, a party may properly amend its SOR to cite that case in support of its appeal.

State of Alaska, Dept. of Transportation & Public Facilities (In re Irene Johnson & Jack Craig), 133 IBLA 281 (Aug. 9, 1995)

RULES OF PRACTICE--Continued

APPEALS--Continued

Statement of Reasons--Continued

An appeal supported by a SOR which does not meet the Department's rules of practice may be dismissed. However, dismissal is not mandatory and each case will be considered individually.

Mustang Fuel Corp., 134 IBLA 1 (Sept. 26, 1995)

Stay

Under 43 CFR 4.21(a), a decision will be effective on the day after the expiration of the time during which a person adversely affected may file a notice of appeal unless a petition for stay pending appeal is filed with the notice of appeal.

Kay Papulak, 132 IBLA 117 (Mar. 1, 1995)

Under 43 CFR 4770.3(b), stays of decisions taking possession of wild horses and canceling private maintenance and care agreements could not be granted and the decisions were properly affirmed when there was admitted failure to comply with animal care instructions issued by the authorized officer pursuant to 43 CFR 4760.1(d) after the horses were found in a deteriorated condition by a BLM inspection.

William J. Ahrndt et al., 132 IBLA 126 (Mar. 6, 1995)

RULES OF PRACTICE--Continued

APPEALS--Continued

Stay--Continued

A request for stay is denied and the underlying appeal is dismissed because an association seeking to appeal a BLM decision to burn woodlands was not a "party to a case" under 43 CFR 4.410(a) and therefore lacked standing to appeal after officers of the association declined to participate in BLM planning prior to issuance of a decision although invited to do so.

Committee for Idaho's High Desert, 133 IBLA 378
(Sept. 19, 1995)

A showing that the existence of reasonable alternative access was problematic provided insufficient reason for overturning a BLM decision to reject a road right-of-way application based on findings that alternative access was available and the proposed road would conflict with BLM planning for protection of deer migration routes.

Albert Eugene Rumfelt, 134 IBLA 19 (Oct. 2, 1995)

Timely Filing

For purposes of 43 CFR 3165.3, receipt by the unit operator, or its agent, of notice by BLM approving a unit or approving a participating area constitutes constructive service on all parties who have joined the unit and BLM has no obligation independently to notify any working interest or royalty interest owner. Any request for review of such an approval is untimely if it is not filed within 20 business days of the date the approval was received by the unit operator, or its agent.

Where a royalty interest owner has not joined a unit, BLM is not required to notify such an owner of unit or participating area approval. Such a royalty

RULES OF PRACTICE--Continued

APPEALS--Continued

Timely Filing--Continued

interest owner is not adversely affected by those BLM actions and, thus, has no right to administrative review thereof.

Orvin Froholm, et al., 132 IBLA 301 (May 3, 1995)

An appeal will be dismissed as untimely when the record fails to establish that the Notice of Appeal was transmitted within the 30-day period established by 43 CFR 4.411(a).

Golden Arc Mining & Refining Inc., 133 IBLA 90 (July 14, 1995)

The timely filing of a notice of appeal is jurisdictional and an appeal filed more than 30 days after receipt of the decision under appeal is properly dismissed. When the 30th day falls on a day when the office is closed, the appeal period is extended to the close of the next day on which the office is open.

Commission for the Preservation of Wild Horses, et al., 133 IBLA 97 (July 18, 1995)

EVIDENCE

A rebuttable presumption exists that officers of the Government charged with receipt of applications duly and properly discharged their duties with respect to such applications. Where the records of the Department fail to disclose the receipt of an application, a party

RULES OF PRACTICE--Continued

EVIDENCE--Continued

challenging this presumption bears the affirmative burden of establishing, by a preponderance of the evidence, that the application in question was duly filed.

The Board has full authority to reverse findings of fact made by an ALJ. However, when the resolution of disputed facts is clearly premised upon a Judge's finding of credibility, which are in turn based upon the Judge's reaction to the demeanor of the witnesses, and such findings are supported by substantial evidence, they ordinarily will not be disturbed by the Board. The basis for this deference is the fact that the Judge who presides over a hearing has the opportunity to observe the witnesses and is in the best position to judge the weight to be given to conflicting testimony.

BLM v. William Carlo, Jr., 133 IBLA 206 (Aug. 1, 1995)

HEARINGS

Evidence offered for the first time during appeal from a decision in a mining claim contest could only be reviewed to determine whether another hearing should be ordered; since the offer made did not tend to show there was some likelihood of success on the merits at rehearing and it was not explained why the evidence was not offered at the contest hearing, another hearing was not required.

United States v. Sandra K. Memmott et al., 132 IBLA 283 (May 2, 1995)

RULES OF PRACTICE--Continued

HEARINGS--Continued

While parties are free to waive post-hearing briefs, an ALJ must make detailed findings and conclusions on the record. When parties wish to shorten the time for filing an appeal and the ALJ is willing to issue an oral decision, he must nevertheless fully and clearly present his findings of fact and conclusions of law for the record.

An ALJ is not limited to deciding issues of fact under 43 CFR 4.1286. An ALJ is expected to receive evidence on and consider all relevant matters and to address the legal and factual issues necessary to resolve the dispute between the parties. If the Board wishes to limit the scope of a hearing, it may so state in the order of referral.

James Spur, Inc., et al. v. Office of Surface Mining & Enforcement, 133 IBLA 123 (July 26, 1995) 102 I.D. 43

A rebuttable presumption exists that officers of the Government charged with receipt of applications duly and properly discharged their duties with respect to such applications. Where the records of the Department fail to disclose the receipt of an application, a party challenging this presumption bears the affirmative burden of establishing, by a preponderance of the evidence, that the application in question was duly filed.

BLM v. William Carlo, Jr., 133 IBLA 206 (Aug. 1, 1995)

The voluntary decision of a contestee not to proceed but rather to challenge a ruling by an ALJ that a prima facie case has been presented at a hearing constitutes a waiver of the contestee's right to present evidence on his or her own behalf. Should the appeal of the ruling be unsuccessful, the

RULES OF PRACTICE--Continued

HEARINGS--Continued

contestee will not ordinarily be afforded an additional hearing.

Where, at the close of the Government's case-in-chief, a contestee moves for dismissal of the complaint on the ground that a prima facie showing has not been made, it is error for an ALJ to take the motion under advisement and direct the contestee to proceed with its presentation.

United States v. Angeline Galbraith, 134 IBLA 75
(Oct. 12, 1995) 102 I.D. 116

SCHOOL LANDS

(See also State Selections)

MINERAL LANDS

A mining claimant who contends that land within a state school grant was encompassed by a mining claim and therefore unavailable for such conveyance bears the burden of overcoming a presumption that land granted to a state for school purposes was of the character contemplated by the grant and that title to the land consequently passed to the state. On a record that failed to establish the validity of the mining claim or the character of the land claimed, BLM properly declared the mining claim null and void ab initio.

Daniel O. Dismukes, 133 IBLA 335 (Sept. 6, 1995)

SECRETARY OF THE INTERIOR

(See also Administrative Authority)

When the FERC issues a certificate of convenience and necessity for a natural gas pipeline that crossing public land and a petition for judicial review of the certificate is filed with the appropriate U.S. Court of Appeals, the exclusive judicial review provision of 15 U.S.C. § 717r (1988), does not deprive the Secretary of the Interior of his authority to review a decision of a subordinate approving a right-of-way for the pipeline. A motion to dismiss an appeal to the Board of Land Appeals (which exercises the Secretary's delegated administrative review authority) claiming the appeal to be a collateral attack on a FERC certificate authorizing the pipeline is properly denied.

Wyoming Independent Producers Ass'n, Independent Petroleum Ass'n of Mountain States, Wyoming Outdoor Council, National Trust for Historic Preservation,
133 IBLA 65 (July 13, 1995)

The Department has a policy of refunding prepayment of a civil penalty made to secure administrative review of the penalty when the failure to petition for review timely or to tender payment timely requires dismissal of the petition for review. This policy is not operative when it appears from the record that the payment was tendered to facilitate issuance of a permit and not in order to secure review of the penalty.

Office of Surface Mining Reclamation & Enforcement v. Tri-J Coal Co., 134 IBLA 10 (Sept. 29, 1995)

SPECIAL USE PERMITS

A special recreation permit holder is subject to any permit condition or stipulation BLM deems necessary to protect the public interest, and where a commercial river rafting permit holder is on notice that violation of party size restrictions may result in sanctions, BLM may invoke such sanctions upon noncompliance.

A decision issuing a special recreation permit for commercial river rafting on a probationary basis based on party size violations during the previous commercial rafting season will be affirmed on appeal where the case record establishes that the permittee violated the party size restriction on four occasions during that previous season.

Carrol White, 132 IBLA 141 (Mar. 16, 1995)

BLM properly denies an application for a special recreation use permit for an organized off-road motorcycle race where the record establishes that it would widen an existing trail in a WSA and thereby impair its suitability for designation as wilderness, as such use is forbidden by sec. 603(c) of FLPMA.

Lassen Motorcycle Club, 133 IBLA 104 (July 20, 1995)

An application for a land-use permit to allow a survey of Federal land sought to be acquired for use as a land-fill and co-generation plant was properly rejected because the ultimate use proposed was not consistent with the Arizona Strip RMP.

Perfect Ten Industries, 134 IBLA 118 (Nov. 1, 1995)

STATE GRANTS

A mining claimant who contends that land within a state school grant was encompassed by a mining claim and therefore unavailable for such conveyance bears the burden of overcoming a presumption that land granted to a state for school purposes was of the character contemplated by the grant and that title to the land consequently passed to the state. On a record that failed to establish the validity of the mining claim or the character of the land claimed, BLM properly declared the mining claim null and void ab initio.

Daniel O. Dismukes, 133 IBLA 335 (Sept. 6, 1995)

STATUTE OF LIMITATIONS

A MMS demand for additional royalty on production from Federal onshore oil and gas leases is an administrative action not covered by 28 U.S.C. § 2415(a)(1988), which establishes a 6-year time limitation for the commencement of judicial actions for damages by the United States.

Texaco Inc., 134 IBLA 109 (Oct. 12, 1995)

The 6-year statute of limitations at 28 U.S.C. § 2415(a) (1988), for commencement by the United States of civil actions for damages, does not apply to limit administrative action by the Department. An MMS order requiring recalculation and payment of additional royalties on an Indian allottee oil and gas lease is an administrative action that is not covered by that statute of limitations.

Texaco Exploration and Production, Inc., 134 IBLA 267 (Dec. 1, 1995)

STATUTES

When legislation enacted during the pendency of an appeal alters the premise of a BIA decision concerning the service population under an Indian Self-Determination Act contract, the Board of Indian Appeals will remand the matter to the Bureau for issuance of a new decision taking the new law into account.

Douglas Indian Ass'n v. Juneau Area Director, Bureau of Indian Affairs, 27 IBIA 292 (Apr. 18, 1995)

STATUTORY CONSTRUCTION

GENERALLY

Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.

Peoria Tribe of Indians of Oklahoma v. Acting Muskogee Area Director, Bureau of Indian Affairs, 27 IBIA 113 (Jan. 5, 1995)

Under established rules of statutory construction, a statute should be interpreted so as not to render one part inoperative.

Shakopee Mdewakanton Sioux Community v. Acting Minneapolis Area Director, Bureau of Indian Affairs, 27 IBIA 163 (Feb. 8, 1995)

STATUTORY CONSTRUCTION--Continued

INDIANS

Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.

Peoria Tribe of Indians of Oklahoma v. Acting Muskogee Area Director, Bureau of Indian Affairs, 27 IBIA 113 (Jan. 5, 1995)

When officials of the DOI are called upon to interpret tribal constitutions, they should employ the same rules of statutory construction as are applicable to Federal and state constitutions and statutes.

Shakopee Mdewakanton Sioux Community v. Acting Minneapolis Area Director, Bureau of Indian Affairs, 27 IBIA 163 (Feb. 8, 1995)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

ABATEMENT

Remedial Actions

Upon review of action taken by the State regulatory authority in response to a 10-day notice, enforcement action which is not arbitrary, capricious, or an abuse of discretion under the State program is considered appropriate action to secure abatement of the violation. Issuance of an NOV requiring permittee to amend the permit to stipulate to extend revegetation trials and submit the results to the State regulatory authority by a date certain and, further, to cover completed coal waste lifts to a depth approved by the authority based on the field trial results by a date certain may be found not to be an abuse of discretion under the rules of the State program, justifying vacating an NOV issued

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

ABATEMENT--Continued

Remedial_Actions--Continued

by OSM for failure to achieve contemporaneous reclamation.

Powderhorn Coal Co. v. Office of Surface Mining & Reclamation, 132 IBLA 290 (May 3, 1995)

The Department is entitled to rely on the reasoned analysis of its experts in matters within the realm of their expertise. Where OSM reviewed state action denying relief where citizens complained that limited spoil was used to build an improved roadway across an existing bench instead of to eliminate a previously mined highwall to the maximum extent technically practical, it was incumbent upon citizens to demonstrate to OSM that the state's action was arbitrary and capricious, or an abuse of discretion.

Harvey Catron, Jo D. Molinary, 134 IBLA 244 (Nov. 30, 1995)

ADMINISTRATIVE PROCEDURE

Burden_of_Proof

Where contracts between an applicant or other party seeking to have an ownership or control link dissolved and an operator which has unabated violations of SMCRA and outstanding unpaid civil penalties contain provisions stating that the applicant owned rights to the coal to be mined and requiring the other party to deliver minimum quantities of coal, the requirements established under 30 CFR 773.5(b)(6) (1994) for a rebuttable presumption of ownership or control have been met. The question is whether the applicant rebutted the presumption by establishing by a preponderance of the evidence, as contained in the record as a whole, that it

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

ADMINISTRATIVE PROCEDURE--Continued

Burden_of_Proof--Continued

did not have "authority directly or indirectly to determine the manner in which" the operator conducted its surface mining operations under 30 CFR 773.5(b) (1994).

James Spur, Inc., et al. v. Office of Surface Mining & Enforcement, 133 IBLA 123 (July 26, 1995) 102 I.D. 43

The Department is entitled to rely on the reasoned analysis of its experts in matters within the realm of their expertise. Where OSM reviewed state action denying relief where citizens complained that limited spoil was used to build an improved roadway across an existing bench instead of to eliminate a previously mined highwall to the maximum extent technically practical, it was incumbent upon citizens to demonstrate to OSM that the state's action was arbitrary and capricious, or an abuse of discretion.

Harvey Catron, Jo D. Molinary, 134 IBLA 244 (Nov. 30, 1995)

Findings

While parties are free to waive post-hearing briefs, an ALJ must make detailed findings and conclusions on the record. When parties wish to shorten the time for filing an appeal and the ALJ is willing to issue an oral decision, he must nevertheless fully and clearly present his findings of fact and conclusions of law for the record.

An ALJ is not limited to deciding issues of fact under 43 CFR 4.1286. An ALJ is expected to receive evidence on and consider all relevant matters and to address the legal and factual issues necessary to resolve the dispute between the parties. If the Board

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

ADMINISTRATIVE PROCEDURE--Continued

Findings--Continued

wishes to limit the scope of a hearing, it may so state in the order of referral.

James Spur, Inc., et al. v. Office of Surface Mining & Enforcement, 133 IBLA 123 (July 26, 1995) 102 I.D. 43

APPLICABILITY

Enforcement Provisions

Under SMCRA, a state with an approved state program has primary responsibility for enforcing its state standards, but OSM, in an oversight role, has the responsibility of enforcing those same standards on a mine-by-mine basis, if a state fails to do so. Unless OSM has authority to enforce mining and reclamation standards when a state does not do so, there is no oversight.

Pittsburg & Midway Coal Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 132 IBLA 59 (Feb. 16, 1995) 102 I.D. 1

APPLICANT VIOLATOR SYSTEM

Generally

Where contracts between an applicant or other party seeking to have an ownership or control link dissolved and an operator which has unabated violations of SMCRA and outstanding unpaid civil penalties contain provisions stating that the applicant owned rights to the coal to be mined and requiring the other party to deliver minimum quantities of coal, the requirements established under 30 CFR 773.5(b)(6) (1994) for a rebuttable presumption of ownership or control have been

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

APPLICANT VIOLATOR SYSTEM--Continued

Generally--Continued

met. The question is whether the applicant rebutted the presumption by establishing by a preponderance of the evidence, as contained in the record as a whole, that it did not have "authority directly or indirectly to determine the manner in which" the operator conducted its surface mining operations under 30 CFR 773.5(b) (1994).

Where contracts between an applicant seeking to have an ownership or control link dissolved and an operator which has unabated violations of SMCRA and outstanding unpaid civil penalties contain provisions stating that the applicant secured mining permits to be used by the operator, the applicant "controls" the operator. However, where the operator's mining operations did not result in any violations that remained unabated, and there are no unpaid civil penalties arising from any of the mining operations under those contracts, those contracts do not provide a basis for establishing an ownership or control link under the AVS.

Under 30 CFR 773.5(b) (1994), one entity may "control" another where it has "authority" to determine the manner in which mining operations are conducted. It is not required that such authority actually have been exercised.

An ownership or control link is properly dissolved where the evidence as a whole fails to demonstrate either (1) that an applicant had direct authority via oral or written contract to supervise or oversee the operator's mining operations, that the operator was obliged by any contractual provisions to obey directions by the applicant or its officer/directors concerning the manner in which it mined coal, or that the applicant (or its representative) actually supervised or oversaw mining operations; or (2) that the applicant had indirect authority via oral or written contract to compel or coerce the operator to take specific steps in its operations. Although indirect authority may also be established by inference from the relationship between the applicant and the operator, no basis for finding

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

APPLICANT VIOLATOR SYSTEM--Continued

Generally--Continued

indirect authority exists where the applicant has offered credible explanations demonstrating legitimate purposes (apart from an interest or intention to influence the conduct of operations) for elements of its relationship with the operator.

James Spur, Inc., et al. v. Office of Surface Mining & Enforcement, 133 IBLA 123 (July 26, 1995) 102 I.D. 43

Ownership and Control

On appeal from a decision of an ALJ granting temporary relief under 43 CFR 4.1386 from a decision by OSM finding an ownership and control link and refusing to delete such information from its AVS, the Board may limit its review to whether the ALJ committed an error of law or abused his discretion in granting such relief.

U.S. Steel Mining Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 132 IBLA 121 (Mar. 3, 1995)

A decision of an ALJ granting temporary relief under 43 CFR 4.1386 from a decision by OSM finding an ownership and control link and refusing to delete such information from its AVS is properly affirmed on appeal where OSM fails to establish that the ALJ committed an error of law or abused his discretion in granting such relief.

U.S. Steel Mining Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 132 IBLA 216 (Apr. 4, 1995)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

BACKFILLING AND GRADING REQUIREMENTS

Highwall_Elimination

The Department is entitled to rely on the reasoned analysis of its experts in matters within the realm of their expertise. Where OSM reviewed state action denying relief where citizens complained that limited spoil was used to build an improved roadway across an existing bench instead of to eliminate a previously mined highwall to the maximum extent technically practical, it was incumbent upon citizens to demonstrate to OSM that the state's action was arbitrary and capricious, or an abuse of discretion.

Harvey Catron, Jo D. Molinary, 134 IBLA 244
(Nov. 30, 1995)

Previously_Mined_Lands

Where limited spoil existed to backfill an existing highwall "to the maximum extent technically practical" as required by Virginia Coal Surface Mining Reclamation Regulation sec. 480-03-19.819.19(b), to the extent the State regulatory authority permitted a road across an existing bench below the highwall to be constructed to standards beyond those necessary to accomplish the purpose for which the road was approved, the State's approval of the road as constructed conflicted with the regulation, and was therefore an arbitrary and capricious action.

Harvey Catron, Jo D. Molinary, 134 IBLA 244
(Nov. 30, 1995)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

BONDS

Release of

A party appealing under the regulations at 43 CFR 1280-1286 an OSM decision to grant a Phase I bond release with regard to a reclaimed area bears the burden of showing that OSM erred.

A Phase I bond release may be upheld despite the absence of topsoil on the reclaimed area when, in response to a citation for failure to segregate topsoil, the permittee has agreed to amend the soil as necessary to support vegetation. Condition of the soil is properly considered in determining compliance with revegetation requirements when considering a Phase II bond release.

A decision to grant a Phase I bond release on the ground the permit areas have been graded and back-filled to approximate original contour will be upheld where the record establishes that the surface configuration achieved by backfilling and grading the mined area closely resembles the general configuration of the land prior to mining with all highwalls eliminated.

William H. Pullen, Jr., et al., 132 IBLA 224 (Apr. 13, 1995)

CESSATION ORDERS

Generally

Surface mining operators who created a related surface mining disturbance on four sites that aggregated more than 2 acres were responsible for compliance with permanent surface mining program performance standards notwithstanding unsupported

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

CESSATION ORDERS--Continued

Generally--Continued

contentions that enforcement of those standards by OSM was unauthorized in law and fact.

Estill Stone et al. v. Office of Surface Mining Reclamation & Enforcement, 134 IBLA 15 (Oct. 2, 1995)

CITIZEN'S COMPLAINTS

Generally

Under West Virginia State law, an operator of a surface mining operation is required to replace the water supply of an owner of interest in real property when that owner's underground or surface source of supply is contaminated, diminished, or interrupted by such operation, unless waived by the owner. When OSM issues a 10-day notice to a state regulatory authority pursuant to sec. 521(a)(1) of SMCRA, 30 U.S.C. § 1271(a)(1) (1982), in response to a citizen's complaint alleging a failure to continue to supply replacement water, this Board will affirm OSM's decision declining to take Federal enforcement action where the record shows that the owner waived the right to replacement water under West Virginia State law.

Patricia A. Marsh, 133 IBLA 372 (Sept. 19, 1995)

The Department is entitled to rely on the reasoned analysis of its experts in matters within the realm of their expertise. Where OSM reviewed state action denying relief where citizens complained that limited spoil was used to build an improved roadway across an existing bench instead of to eliminate a previously mined highwall to the maximum extent technically practical, it was incumbent upon citizens

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

CITIZEN'S COMPLAINTS--Continued

Generally--Continued

to demonstrate to OSM that the state's action was arbitrary and capricious, or an abuse of discretion.

Harvey Catron, Jo D. Molinary, 134 IBLA 244
(Nov. 30, 1995)

CIVIL PENALTIES

Hearings_Procedure

The Department has a policy of refunding prepayment of a civil penalty made to secure administrative review of the penalty when the failure to petition for review timely or to tender payment timely requires dismissal of the petition for review. This policy is not operative when it appears from the record that the payment was tendered to facilitate issuance of a permit and not in order to secure review of the penalty.

Office of Surface Mining Reclamation & Enforcement v. Tri-J Coal Co., 134 IBLA 10 (Sept. 29, 1995)

EXEMPTIONS

Generally

A determination by a state hearing officer to vacate a state violation issued in response to a 10-day notice, which is based on the erroneous conclusion that the coal refuse area in question was exempt from state regulation, will be considered arbitrary and capricious,

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

EXEMPTIONS--Continued

Generally--Continued

where, under the state program, no exemption is available.

Pittsburg & Midway Coal Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 132 IBLA 59 (Feb. 16, 1995) 102 I.D. 1

2-Acre

Surface mining operators who created a related surface mining disturbance on four sites that aggregated more than 2 acres were responsible for compliance with permanent surface mining program performance standards notwithstanding unsupported contentions that enforcement of those standards by OSM was unauthorized in law and fact.

Estill Stone et al. v. Office of Surface Mining Reclamation & Enforcement, 134 IBLA 15 (Oct. 2, 1995)

HEARINGS

Procedure

The Department has a policy of refunding prepayment of a civil penalty made to secure administrative review of the penalty when the failure to petition for review timely or to tender payment timely requires dismissal of the petition for review. This policy is not operative when it appears from the record that the payment was

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

HEARINGS--Continued

Procedure--Continued

tendered to facilitate issuance of a permit and not in order to secure review of the penalty.

Office of Surface Mining Reclamation & Enforcement v. Tri-J Coal Co., 134 IBLA 10 (Sept. 29, 1995)

INSPECTIONS

10-day Notice to State

Under 30 CFR 842.11(b)(1)(ii)(B)(2), both "appropriate action" and "good cause" are to be measured by whether the state regulatory authority's action or response to a 10-day notice is arbitrary, capricious, or an abuse of discretion under the state program. "Appropriate action" is defined at 30 CFR 842.11(b)(1)(ii)(B)(3), and 30 CFR 842.11(b)(1)(ii)(B)(4) lists five situations that will be considered "good cause" for the state regulatory authority to fail to take action to have a violation corrected.

OSM's oversight authority, as defined by statute, the regulations, and recent case law, requires rejection of the argument that the five situations listed in 30 CFR 842.11(b)(1)(ii)(B)(4) establish "good cause," per se, and preclude OSM from making any inquiry regarding the state response to a 10-day notice.

In light of OSM's oversight responsibilities, a fair reading of the preamble to OSM's 1988 revision of its 10-day notice regulations dictates that OSM make some type of independent inquiry when the State regulatory authority is precluded by an administrative order from a state administrative body from acting on the

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

INSPECTIONS--Continued

10-day Notice to State--Continued

possible violation, where that order is based on the violation not existing.

The applicable standard of review to be applied by OSM in determining whether a decision or an order of a state administrative body that a violation does not exist is good cause for failing to correct the violation is the arbitrary, capricious, or abuse of discretion standard, the same standard applicable to OSM review of state regulatory authority actions or responses. Such a decision or order would be arbitrary and capricious if it did not have a proper basis, and it would be an abuse of discretion if the administrative body were acting outside the scope of its authority under the state program in making such a ruling.

A determination by a state hearing officer to vacate a state violation issued in response to a 10-day notice, which is based on the erroneous conclusion that the coal refuse area in question was exempt from state regulation, will be considered arbitrary and capricious, where, under the state program, no exemption is available.

An interpretation of New Mexico Coal Surface Mining Commission Rule 80-1 § 20-72(d) that no designed diversion was necessary for the surface of a coal refuse area is not arbitrary, capricious, or an abuse of discretion and constitutes good cause for failing to have the alleged violation corrected.

Pittsburg & Midway Coal Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 132 IBLA 59 (Feb. 16, 1995) 102 I.D. 1

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

INSPECTIONS--Continued

10-day Notice to State--Continued

Where the Board reverses a decision by OSM under 30 CFR 842.15 declining to order a Federal inspection, the Board's authority is limited to ordering such inspection. Upon completion of the inspection, it is within OSM's authority to determine whether enforcement action is warranted.

Dixie Fuels Co., 132 IBLA 331 (May 9, 1995)

Where a state administrative hearing officer has rendered a determination, the doctrines of res judicata and collateral estoppel will not preclude OSM from making an independent inquiry into whether a state action is arbitrary, capricious, or an abuse of discretion, nor will it constitute per se evidence of a state's good cause for failure to act on a 10-day notice.

Where limited spoil existed to backfill an existing highwall "to the maximum extent technically practical" as required by Virginia Coal Surface Mining Reclamation Regulation sec. 480-03-19.819.19(b), to the extent the State regulatory authority permitted a road across an existing bench below the highwall to be constructed to standards beyond those necessary to accomplish the purpose for which the road was approved, the State's approval of the road as constructed conflicted with the regulation, and was therefore an arbitrary and capricious action.

The Department is entitled to rely on the reasoned analysis of its experts in matters within the realm of their expertise. Where OSM reviewed state action denying relief where citizens complained that limited spoil was used to build an improved roadway across an existing bench instead of to eliminate a previously mined highwall to the maximum extent technically practical, it was incumbent upon citizens

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

INSPECTIONS--Continued

10-day Notice to State--Continued

to demonstrate to OSM that the state's action was arbitrary and capricious, or an abuse of discretion.

Harvey Catron, Jo D. Molinary, 134 IBLA 244
(Nov. 30, 1995)

NOTICES OF VIOLATION

Remedial Actions

Upon review of action taken by the State regulatory authority in response to a 10-day notice, enforcement action which is not arbitrary, capricious, or an abuse of discretion under the State program is considered appropriate action to secure abatement of the violation. Issuance of an NOV requiring permittee to amend the permit to stipulate to extend revegetation trials and submit the results to the State regulatory authority by a date certain and, further, to cover completed coal waste lifts to a depth approved by the authority based on the field trial results by a date certain may be found not to be an abuse of discretion under the rules of the State program, justifying vacating an NOV issued by OSM for failure to achieve contemporaneous reclamation.

Powderhorn Coal Co. v. Office of Surface Mining & Reclamation, 132 IBLA 290 (May 3, 1995)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

PERFORMANCE BOND OR DEPOSIT

Release

A party appealing under the regulations at 43 CFR 1280-1286 an OSM decision to grant a Phase I bond release with regard to a reclaimed area bears the burden of showing that OSM erred.

A Phase I bond release may be upheld despite the absence of topsoil on the reclaimed area when, in response to a citation for failure to segregate topsoil, the permittee has agreed to amend the soil as necessary to support vegetation. Condition of the soil is properly considered in determining compliance with revegetation requirements when considering a Phase II bond release.

A decision to grant a Phase I bond release on the ground the permit areas have been graded and back-filled to approximate original contour will be upheld where the record establishes that the surface configuration achieved by backfilling and grading the mined area closely resembles the general configuration of the land prior to mining with all highwalls eliminated.

William H. Pullen, Jr., et al., 132 IBLA 224 (Apr. 13, 1995)

SPOIL AND MINE WASTES

Generally

A determination by a state hearing officer to vacate a state violation issued in response to a 10-day notice, which is based on the erroneous conclusion that the coal refuse area in question was exempt from state regulation, will be considered arbitrary and capricious,

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

SPOIL AND MINE WASTES--Continued

Generally--Continued

where, under the state program, no exemption is available.

An interpretation of New Mexico Coal Surface Mining Commission Rule 80-1 § 20-72(d) that no designed diversion was necessary for the surface of a coal refuse area is not arbitrary, capricious, or an abuse of discretion and constitutes good cause for failing to have the alleged violation corrected.

Pittsburg & Midway Coal Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 132 IBLA 59 (Feb. 16, 1995) 102 I.D. 1

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Powderhorn Coal Co. v. Office of Surface Mining & Reclamation, 132 IBLA 290 (May 3, 1995)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

STATE PROGRAM

Generally

Under SMCRA, a state with an approved state program has primary responsibility for enforcing its state standards, but OSM, in an oversight role, has the responsibility of enforcing those same standards on a mine-by-mine basis, if a state fails to do so. Unless OSM has authority to enforce mining and reclamation standards when a state does not do so, there is no oversight.

Pittsburg & Midway Coal Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 132 IBLA 59 (Feb. 16, 1995) 102 I.D. 1

10-day Notice to State

Under 30 CFR 842.11(b)(1)(ii)(B)(2), both "appropriate action" and "good cause" are to be measured by whether the state regulatory authority's action or response to a 10-day notice is arbitrary, capricious, or an abuse of discretion under the state program. "Appropriate action" is defined at 30 CFR 842.11(b)(1)(ii)(B)(3), and 30 CFR 842.11(b)(1)(ii)(B)(4) lists five situations that will be considered "good cause" for the state regulatory authority to fail to take action to have a violation corrected.

OSM's oversight authority, as defined by statute, the regulations, and recent case law, requires rejection of the argument that the five situations listed in 30 CFR 842.11(b)(1)(ii)(B)(4) establish "good cause," per se, and preclude OSM from making any inquiry regarding the state response to a 10-day notice.

In light of OSM's oversight responsibilities, a fair reading of the preamble to OSM's 1988 revision of its 10-day notice regulations dictates that OSM make some type of independent inquiry when the State regulatory authority is precluded by an administrative order from a state administrative body from acting on the

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

STATE PROGRAM--Continued

10-day Notice to State--Continued

possible violation, where that order is based on the violation not existing.

The applicable standard of review to be applied by OSM in determining whether a decision or an order of a state administrative body that a violation does not exist is good cause for failing to correct the violation is the arbitrary, capricious, or abuse of discretion standard, the same standard applicable to OSM review of state regulatory authority actions or responses. Such a decision or order would be arbitrary and capricious if it did not have a proper basis, and it would be an abuse of discretion if the administrative body were acting outside the scope of its authority under the state program in making such a ruling.

A determination by a state hearing officer to vacate a state violation issued in response to a 10-day notice, which is based on the erroneous conclusion that the coal refuse area in question was exempt from state regulation, will be considered arbitrary and capricious, where, under the state program, no exemption is available.

An interpretation of New Mexico Coal Surface Mining Commission Rule 80-1 § 20-72(d) that no designed diversion was necessary for the surface of a coal refuse area is not arbitrary, capricious, or an abuse of discretion and constitutes good cause for failing to have the alleged violation corrected.

Pittsburg & Midway Coal Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 132 IBLA 59 (Feb. 16, 1995) 102 I.D. 1

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

STATE PROGRAM--Continued

10-day Notice to State--Continued

Upon review of action taken by the State regulatory authority in response to a 10-day notice, enforcement action which is not arbitrary, capricious, or an abuse of discretion under the State program is considered appropriate action to secure abatement of the violation. Issuance of an NOV requiring permittee to amend the permit to stipulate to extend revegetation trials and submit the results to the State regulatory authority by a date certain and, further, to cover completed coal waste lifts to a depth approved by the authority based on the field trial results by a date certain may be found not to be an abuse of discretion under the rules of the State program, justifying vacating an NOV issued by OSM for failure to achieve contemporaneous reclamation.

Powderhorn Coal Co. v. Office of Surface Mining & Reclamation, 132 IBLA 290 (May 3, 1995)

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Under West Virginia State law, an operator of a surface mining operation is required to replace the water supply of an owner of interest in real property when that owner's underground or surface source of supply is contaminated, diminished, or interrupted by such operation, unless waived by the owner. When OSM issues a 10-day notice to a state regulatory authority pursuant to sec. 521(a)(1) of SMCRA, 30 U.S.C. § 1271(a)(1) (1982), in response to a citizen's complaint

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

STATE PROGRAM--Continued

10-day Notice to State--Continued

alleging a failure to continue to supply replacement water, this Board will affirm OSM's decision declining to take Federal enforcement action where the record shows that the owner waived the right to replacement water under West Virginia State law.

Patricia A. Marsh, 133 IBLA 372 (Sept. 19, 1995)

Surface mining operators who created a related surface mining disturbance on four sites that aggregated more than 2 acres were responsible for compliance with permanent surface mining program performance standards notwithstanding unsupported contentions that enforcement of those standards by OSM was unauthorized in law and fact.

Estill Stone et al. v. Office of Surface Mining Reclamation & Enforcement, 134 IBLA 15 (Oct. 2, 1995)

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SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

STATE PROGRAM--Continued

10-day Notice to State--Continued

constructed conflicted with the regulation, and was therefore an arbitrary and capricious action.

Harvey Catron, Jo D. Molinary, 134 IBLA 244
(Nov. 30, 1995)

STATE REGULATION

Generally

OSM's oversight authority, as defined by statute, the regulations, and recent case law, requires rejection of the argument that the five situations listed in 30 CFR 842.11(b)(1)(ii)(B)(4) establish "good cause," per se, and preclude OSM from making any inquiry regarding the state response to a 10-day notice.

A determination by a state hearing officer to vacate a state violation issued in response to a 10-day notice, which is based on the erroneous conclusion that the coal refuse area in question was exempt from state regulation, will be considered arbitrary and capricious, where, under the state program, no exemption is available.

An interpretation of New Mexico Coal Surface Mining Commission Rule 80-1 § 20-72(d) that no designed diversion was necessary for the surface of a coal refuse area is not arbitrary, capricious, or an abuse of discretion and constitutes good cause for failing to have the alleged violation corrected.

Pittsburg & Midway Coal Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 132 IBLA 59 (Feb. 16, 1995)
102 I.D. 1

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977
--Continued

STATE REGULATION--Continued

Generally--Continued

Where a state administrative hearing officer has rendered a determination, the doctrines of res judicata and collateral estoppel will not preclude OSM from making an independent inquiry into whether a state action is arbitrary, capricious, or an abuse of discretion, nor will it constitute per se evidence of a state's good cause for failure to act on a 10-day notice.

Where limited spoil existed to backfill an existing highwall "to the maximum extent technically practical" as required by Virginia Coal Surface Mining Reclamation Regulation sec. 480-03-19.819.19(b), to the extent the State regulatory authority permitted a road across an existing bench below the highwall to be constructed to standards beyond those necessary to accomplish the purpose for which the road was approved, the State's approval of the road as constructed conflicted with the regulation, and was therefore an arbitrary and capricious action.

Harvey Catron, Jo D. Molinary, 134 IBLA 244
(Nov. 30, 1995)

TEMPORARY RELIEF

Applications

A substantial likelihood of success on the merits required to be shown by an applicant for temporary relief from a citation under sec. 525(c) of SMCRA, may be found where applicant has raised issues on the merits of the case so "serious, substantial, difficult and doubtful" as to make them appropriate for deliberative resolution in a decision on the merits, rather than in a preliminary determination on the application for temporary relief. The finding required to support temporary relief is properly distinguished from the basis of a

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

TEMPORARY RELIEF--Continued

Applications--Continued

final decision on the merits. Thus, when we are unable to uphold the enforcement action as a preliminary matter on the basis of the record before us, a showing of a substantial likelihood of success on the merits has been made which will justify temporary relief assuming the other statutory criteria are met.

Powderhorn Coal Co. v. Office of Surface Mining Reclamation & Enforcement (On Reconsideration), 132 IBLA 36 (Feb. 9, 1995)

An application for temporary relief from an NOV filed with OHA pending final resolution of an application for review may be granted when a hearing is held by an ALJ in the locality of the permit area; the applicant shows a substantial likelihood of prevailing on the merits; and such relief will not adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air, or water resources. While temporary relief granted after a hearing before the ALJ may lapse with the ALJ's subsequent decision upholding the NOV, when the jurisdiction of the Board is invoked by a timely filed appeal, the Board has authority to reinstate such relief.

Powderhorn Coal Co. v. Office of Surface Mining & Reclamation, 132 IBLA 290 (May 3, 1995)

Evidence

A substantial likelihood of success on the merits required to be shown by an applicant for temporary relief from a citation under sec. 525(c) of SMCRA, may be found where applicant has raised issues on the merits of the case so "serious, substantial, difficult and doubtful" as to make them appropriate for deliberative

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

TEMPORARY RELIEF--Continued

Evidence--Continued

resolution in a decision on the merits, rather than in a preliminary determination on the application for temporary relief. The finding required to support temporary relief is properly distinguished from the basis of a final decision on the merits. Thus, when we are unable to uphold the enforcement action as a preliminary matter on the basis of the record before us, a showing of a substantial likelihood of success on the merits has been made which will justify temporary relief assuming the other statutory criteria are met.

Powderhorn Coal Co. v. Office of Surface Mining Reclamation & Enforcement (On Reconsideration), 132 IBLA 36 (Feb. 9, 1995)

On appeal from a decision of an ALJ granting temporary relief under 43 CFR 4.1386 from a decision by OSM finding an ownership and control link and refusing to delete such information from its AVS, the Board may limit its review to whether the ALJ committed an error of law or abused his discretion in granting such relief.

U.S. Steel Mining Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 132 IBLA 121 (Mar. 3, 1995)

A decision of an ALJ granting temporary relief under 43 CFR 4.1386 from a decision by OSM finding an ownership and control link and refusing to delete such information from its AVS is properly affirmed on appeal where OSM fails to establish that the ALJ committed an error of law or abused his discretion in granting such relief.

U.S. Steel Mining Co., Inc. v. Office of Surface Mining Reclamation & Enforcement, 132 IBLA 216 (Apr. 4, 1995)

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

TEMPORARY RELIEF--Continued

Evidence--Continued

An application for temporary relief from an NOV filed with OHA pending final resolution of an application for review may be granted when a hearing is held by an ALJ in the locality of the permit area; the applicant shows a substantial likelihood of prevailing on the merits; and such relief will not adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air, or water resources. While temporary relief granted after a hearing before the ALJ may lapse with the ALJ's subsequent decision upholding the NOV, when the jurisdiction of the Board is invoked by a timely filed appeal, the Board has authority to reinstate such relief.

Powderhorn Coal Co. v. Office of Surface Mining & Reclamation, 132 IBLA 290 (May 3, 1995)

TOPSOIL

Redistribution

Upon review of action taken by the State regulatory authority in response to a 10-day notice, enforcement action which is not arbitrary, capricious, or an abuse of discretion under the State program is considered appropriate action to secure abatement of the violation. Issuance of an NOV requiring permittee to amend the permit to stipulate to extend revegetation trials and submit the results to the State regulatory authority by a date certain and, further, to cover completed coal waste lifts to a depth approved by the authority based on the field trial results by a date certain may be found not to be an abuse of discretion under the rules of the State program, justifying vacating an NOV issued

SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

--Continued

TOPSOIL--Continued

Redistribution--Continued

by OSM for failure to achieve contemporaneous reclamation.

Powderhorn Coal Co. v. Office of Surface Mining & Reclamation, 132 IBLA 290 (May 3, 1995)

WATER QUALITY STANDARDS AND EFFLUENT LIMITATIONS

Generally

Under West Virginia State law, an operator of a surface mining operation is required to replace the water supply of an owner of interest in real property when that owner's underground or surface source of supply is contaminated, diminished, or interrupted by such operation, unless waived by the owner. When OSM issues a 10-day notice to a state regulatory authority pursuant to sec. 521(a)(1) of SMCRA, 30 U.S.C. § 1271(a)(1) (1982), in response to a citizen's complaint alleging a failure to continue to supply replacement water, this Board will affirm OSM's decision declining to take Federal enforcement action where the record shows that the owner waived the right to replacement water under West Virginia State law.

Patricia A. Marsh, 133 IBLA 372 (Sept. 19, 1995)

SURPLUS PROPERTY

(See also Federal Property & Administrative Services Act)

The proviso in 40 U.S.C. § 483(a)(2) (1994), concerning the transfer of excess Federal real property to Oklahoma Indian tribes, applies only to property within the State of Oklahoma.

The main part of 40 U.S.C. § 483(a)(2) (1994), concerning the transfer of excess Federal real property to Indian tribes, applies to such property located within a current Indian reservation.

Wyandotte Tribe of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs, 28 IBIA 247 (Oct. 25, 1995)

SURVEYS OF PUBLIC LANDS

(See also Boundaries, Public Lands)

DEPENDENT RESURVEYS

One challenging a resurvey after the official filing of the plat of resurvey has the burden of establishing by a preponderance of the evidence that the resurvey was fraudulent or grossly erroneous.

There must be substantial evidence of a perpetuated corner location in order to consider the corner obliterated, rather than lost. Where there was no evidence that an old fence was built along the north/south centerline between quarter section corners, BLM properly determined that the fence did not perpetuate any original quarter corner locations.

Kendal Stewart, 132 IBLA 190 (Mar. 28, 1995)

SURVEYS OF PUBLIC LANDS--Continued

DEPENDENT RESURVEYS--Continued

To the extent that cadastral surveyors employed by BLM conduct a dependent resurvey of the public lands of the United States, pursuant to 43 U.S.C. § 772 (1988), to mark the boundaries of undisposed lands, a state licensing authority may not impose its requirements on such employees when they are engaged within the scope of their official duties.

An interested party challenging acceptance of a plat of a dependent resurvey must establish by a preponderance of the evidence that the resurvey is not an accurate retracement and reestablishment of the lines of the original survey.

Thom Seal et al., 132 IBLA 244 (Apr. 17, 1995)

The purpose of a dependent resurvey is to retrace and reestablish the lines of the original survey in their true and original positions according to the best available evidence of the positions of the original corners. To succeed on appeal, the party challenging the filing of a plat for a dependent resurvey must meet his burden of establishing by a preponderance of the evidence that the resurvey is not an accurate retracement and reestablishment of the lines of the original resurvey.

Where the record establishes that a portion of an original survey was fraudulent, a challenge to a dependent resurvey of part of the fraudulent portion of the original survey will be sustained where the record establishes that a dependent resurvey would not fairly protect the rights of innocent third parties.

Theodore J. Vickman, 132 IBLA 317 (May 8, 1995)

SURVEYS OF PUBLIC LANDS--Continued

DEPENDENT RESURVEYS--Continued

The purpose of a dependent resurvey is to retrace and reestablish the lines of the original survey in their true and original positions according to the best available evidence of the positions of the original corners. To succeed on appeal, the party challenging the filing of a plat for a dependent resurvey must meet his burden of establishing by a preponderance of the evidence that the resurvey is not an accurate retracement and reestablishment of the lines of the original survey.

Where the record establishes that a portion of an original survey was fraudulent, a challenge to a dependent resurvey of part of the fraudulent portion of the original survey will be sustained where the record establishes that a dependent resurvey would not fairly protect the rights of innocent third parties.

Paul Chabot, 132 IBLA 371 (May 24, 1995)

INDEPENDENT RESURVEYS

Tracts surveyed by metes and bounds represent the position and form of lands alienated on the basis of the original survey, located on the ground according to the best available evidence of their true original positions.

Leland Q. Phelps, 134 IBLA 124 (Nov. 3, 1995)

TIMBER SALES AND DISPOSALS

The provisions of 40 CFR 1506.1 which prohibit any actions which would adversely affect the environment prior to the issuance of a ROD in connection with a required programmatic impact statement do not apply

TIMBER SALES AND DISPOSALS--Continued

where the proposed action is covered by an existing program statement.

In re Bryant Eagle Timber Sale, 133 IBLA 25 (June 30, 1995)

TRESPASS

GENERALLY

Use of a road on O&C for hauling logs before a permit is issued is a willful trespass under 43 CFR 2800.0-5(v).

Where the unauthorized use of a road over O&C constitutes a willful trespass, liability is to be calculated in accordance with the regulations at 43 CFR 2801.3(b)(1) and (2) and (c)(2).

Larry Brown & Associates, 132 IBLA 14 (Jan. 19, 1995)

MEASURE OF DAMAGES

Where the unauthorized use of a road over O&C constitutes a willful trespass, liability is to be calculated in accordance with the regulations at 43 CFR 2801.3(b)(1) and (2) and (c)(2).

Larry Brown & Associates, 132 IBLA 14 (Jan. 19, 1995)

WATER AND WATER RIGHTS

GENERALLY

The requirement that in preparing an EIS an agency shall "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated," 40 CFR 1502.14(a), does not require an agency to discuss alternatives that would not satisfy the purposes of the proposed action or that are remote and speculative. In an EIS on a proposed right-of-way to construct a dam and reservoir, BLM's review of alternatives was reasonable, and its reasons for having eliminated from detailed study alternatives that could not be implemented in time or about which there was insufficient information available were sufficient and were adequately discussed.

When considering applications for rights-of-way privileges, the DOI has no power to determine questions of control and appropriation of water rights as between private parties, as such questions are exclusively matters of state law.

Allen D. Miller, 132 IBLA 270 (Apr. 24, 1995)

When considering an application for a water pipeline right-of-way, the Department has no power to determine questions of control and appropriation of water rights, as between private parties, as such questions are exclusively matters of state law.

Jeff & Patty Walker, 133 IBLA 317 (Aug. 22, 1995)

WATER AND WATER RIGHTS--Continued

STATE LAWS

When considering applications for rights-of-way privileges, the DOI has no power to determine questions of control and appropriation of water rights as between private parties, as such questions are exclusively matters of state law.

Allen D. Miller, 132 IBLA 270 (Apr. 24, 1995)

When considering an application for a water pipeline right-of-way, the Department has no power to determine questions of control and appropriation of water rights, as between private parties, as such questions are exclusively matters of state law.

Jeff & Patty Walker, 133 IBLA 317 (Aug. 22, 1995)

WILD AND SCENIC RIVERS ACT

The failure to prepare a comprehensive river management plan in accordance with 16 U.S.C. § 1274(d)(1) (1988), is not a bar to implementation of a native hardwoods supplementation plan in the John Day River Basin when such a project is consistent with existing RMP's and protective of resource values listed in the Wild and Scenic Rivers Act.

Wilderness Watch, 132 IBLA 388 (June 13, 1995)

WILD FREE-ROAMING HORSES AND BURROS ACT

Under 43 CFR 4770.3(b), stays of decisions taking possession of wild horses and canceling private maintenance and care agreements could not be granted and the decisions were properly affirmed when there was admitted failure to comply with animal care instructions issued by the authorized officer pursuant to 43 CFR 4760.1(d) after the horses were found in a deteriorated condition by a BLM inspection.

William J. Ahrndt et al., 132 IBLA 126 (Mar. 6, 1995)

A decision determining the appropriate management level for wild horses based on monitoring of forage condition, range usage, an inventory of wild horse numbers, and application of a desired stocking formula to determine grazing capacity may be affirmed where the record supports a finding that removal of horses in excess of the appropriate management level is necessary to restore the range to a thriving ecological balance.

Commission for the Preservation of Wild Horses, et al., 133 IBLA 97 (July 18, 1995)

A BLM decision amending a wild horse area management plan will be upheld where the decision is predicated on a reasoned analysis of monitoring data such as grazing utilization, trend in range condition, actual use, and other factors which demonstrate that reduction of the appropriate management level will restore the range to a thriving natural ecological balance and prevent a deterioration of the range, in accordance with sec. 3(b) of the Wild Free-Roaming Horses and Burros Act, as amended, 16 U.S.C. § 1333(b) (1994).

American Horse Protection, Inc., Joey R. Deeg, 134 IBLA 24 (Oct. 3, 1995)

WITHDRAWALS AND RESERVATIONS

POWERSITES

Placer mining claims were invalid because they were located on land licensed for a power project that was closed to mineral entry under sec. 2(a) of the Mining Claims Rights Restoration Act of 1955.

Alan Bruce, 133 IBLA 297 (Aug. 9, 1995)

WITHDRAWAL AND RETENTION

CONCEPTS

The concepts of withdrawal and retention are closely related. Withdrawal refers to the process of removing a substance from the system, while retention refers to the process of keeping a substance in the system. Both concepts are important in the study of drug use and addiction.

Withdrawal is a process that occurs when a person stops using a substance. It is characterized by a variety of symptoms, including anxiety, irritability, and physical discomfort. Retention, on the other hand, is a process that occurs when a person continues to use a substance. It is characterized by a variety of symptoms, including tolerance, dependence, and addiction.

The concepts of withdrawal and retention are important in the study of drug use and addiction. They help us understand how drugs affect the body and mind, and how they can lead to addiction. By studying these concepts, we can develop better treatments for addiction and help people who are struggling with drug use.

